

Law
Repts
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Upper Canada Reports, Common Pleas

REPORTS OF CASES

DECIDED

IN THE

COURT OF COMMON PLEAS

OF

UPPER CANADA;

FROM TRINITY TERM 15 VICTORIA TO TRINITY TERM 16 VICTORIA.

BY

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J U D G E S
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD OF THESE REPORTS.

THE HON. JAMES BUCHANAN MACAULAY, *Chief Justice.*

“ “ ARCHIBALD McLEAN,

“ “ ROBERT BALDWIN SULLIVAN.

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REPORTS OF CASES
IN
THE COURT OF COMMON PLEAS.

TRINITY TERM, 15TH VICTORIA.

Present—THE HON. J. B. MACAULAY, C. J.
“ “ MR. JUSTICE McLEAN.
“ “ MR. JUSTICE SULLIVAN.

DOE MILLS V. KELLY.

Continuances—Estoppel.

A nisi prius record in ejectment having been passed and brought to trial without a second *placita*.—*Held*, that the omission was not a sufficient ground for setting aside the verdict or trial for irregularity.

The lessor of the plaintiff having previously recovered judgment against the defendant, in an action brought on the covenants for the payment of money contained in two several mortgages, on which this action of ejectment was brought, in which prior action the defendant had pleaded usury, and the issue thereon having been found for the plaintiff, an execution issued against the lands of the defendant, and the premises contained in the mortgages were under the stat. 12 Vic. ch. 73, sold to the defendant, who at the time of the trial of this action was in possession, claiming to hold under a deed from the sheriff.

Held, that there was a sufficient privity of estate between the purchaser at the sheriff's sale, [the defendant in this suit,] under the execution against the judgment debtor, to enable the lessor of the plaintiff to estop the defendants from setting up the same defence of usury, unsuccessfully set up by the judgment debtor, under which the defendant claims.

The Nisi Prius record is entitled in the court of Common Pleas. Pleas at Toronto, before, &c., of Hilary Term, 14 Victoria. Declaration: ejectment for lands in the City of Hamilton: demise laid the 1st of January, 1851. The plea is headed Hilary Term, 14 Victoria—not guilty. The replication is headed Hilary Term, 14 Victoria; the similitur is added, and the record then proceeds: Therefore let a jury thereupon come before our Lady the Queen, at Toronto, on the 15th day of February, 1851, by whom, &c., and who neither, &c., because as well, &c., the same day is given to the parties aforesaid, at the same place; afterwards on the fifteenth day of February, 1851, the jury between the parties aforesaid is respited here until the second day of June,

1851—unless the Honorable John Beverley Robinson, one of Her Majesty's justices assigned to take the assizes in and for the said united counties, &c., shall first come on the 9th of April, 1851, at the City of Hamilton, &c., according to the statute, &c., for default of the jurors, because none of them did appear, therefore let the sheriff have the bodies of the said jurors accordingly, &c.

The lessor of the plaintiff's title consisted of two mortgages executed to him by Daniel Kelly, previous to the defendant's entry into possession. For the defendant it was stated by his counsel that the lessor of the plaintiff had previous to this action sued and recovered judgment against the mortgagor on the covenants, for the payment of the money secured by such mortgages; in which action the defendant had pleaded usury as a defence, upon which the issue was found for the plaintiff; and that under an execution against the lands of the mortgagor, the premises in question were, under the statute 12 Victoria, chap. 73, sold to the defendant, who at the time of the trial was in possession, claiming to hold under the deed of the sheriff of the united counties of Wentworth and Halton. The action by the lessor of the plaintiff against Daniel Kelly was brought in February, 1850, on two covenants, for the payment of money by instalments, dated respectively the 5th of January, 1848, and the 12th of June, 1849—breaches being assigned of non-payment of the instalments due. The 1st count was on a covenant for the payment of 3500*l.*, to which the second plea was usury; and the 2nd count was on a mortgage to secure 30*l.*, payable every six months for twenty-one years; and then 1000*l.* The replication *de injuria*. There was no plea of usury to the 2nd count, and the breach was confessed. The verdict and judgment on the second issue *i. e.* usury, was for the plaintiff. The plaintiff having obtained judgment, and issued execution against the lands of Daniel Kelly, the sheriff on the 25th July, 1850, sold the premises in question to the defendant. The defendant, on the trial of this cause, desired to set up the same objection of usury to the same mortgage which was objected to by the plaintiff's counsel on the ground that he held in privity with or

under, Daniel Kelly the judgment debtor, that the latter was estopped by the judgment recovered, and therefore the defendant also; and, as to the other mortgages, there was no objection, so that the plaintiff was entitled, at all events, to a verdict. The Chief Justice of the Court of Queen's Bench who tried the cause being of opinion that the defendant was bound by the estoppel; refused the evidence offered by the defendant; and the plaintiff had a general verdict. In Easter Term, 14 Victoria, *Cameron*, Q. C., obtained a rule calling on the lessor of the plaintiff to shew cause why the verdict should not be set aside on two grounds:—1st. That the record was defective, owing to the omission of a second *placita*, and the trial therefore irregular or void. 2nd. That the defendant was entitled to set up usury as a defence, was not estopped, and that the evidence offered was therefore improperly rejected.

Connor, Q. C., shewed cause, and contended that a second *placita* was unnecessary—2 Sellon's Practice, introduction 72, page 423, explaining the origin and reasons for the practice; 2 Saund. 253 (a); and Badgley's Practice, 166, and form No. 12; also the forms in Chitty's Archbold's Practice; Tidd, &c., Cow. 407.—That the record may be amended if necessary.—2 Bing. 384; 1 M. & Rob. 474. 2nd. That the defendant could not set up the defence of usury, being bound by a privity of estate and estopped by the lessor of the plaintiff's judgment, against Daniel Kelly, under which defendant purchased and holds. Also that the estoppel might be set up under the general issue, and was conclusive in evidence, though not pleaded.—2 Smith's, L. C. 436; Taylor's Evidence, secs. 1218, 1225; 2 W. B. 827; 3 Wil. 304; 13 M. & W. 654 and 681; 2 Ex. R. 375, 368; 10 A. & E. 763; 13 Ju. 1000.

Cameron, Q. C., in reply, as to the first point, relied on the recent decision of *Doe Burnham v. Simmons* (7 U. C. Q. B. R. 598), as expressly in point. 2nd. He contended that the usury alleged might be proved; that there was no sufficient privity between the mortgagor and the defendant to estop the latter by reason of the judgment of the lessor of the plaintiff against the former. That the sheriff

sold all Daniel Kelly's right and title ; and defendant stood upon an independent footing, claiming as the purchaser under the sheriff ; and if he could displace the mortgage, Daniel Kelly's right would then be the unincumbered fee simple which the defendant acquired under the terms of his purchase and the sheriff's deed.—Co. Lit. 476 ; 4 B. N. S. 782 ; 1 B. N. S. 253 ; 2 M. & Scott, 609 ; 2 A. & E. 11 ; 4 Dow. 374.—At all events that without being pleaded and relied upon as an estoppel, the jury were not concluded but might find the truth, according to the evidence.

MACAULAY, C. J.—With respect to the first objection, I do not think the omission of a second *placita* a sufficient ground for setting aside the verdict for irregularity or an irregular trial, leaving the Nisi Prius record unassailed. The application should have been to set aside the Nisi Prius record as improperly made up and passed, and as a consequence the subsequent trial also ; however, I do not think the objection valid in any form. The only cases I find respecting the influence of the new rules upon actions of ejectment, are 1 Bing. N. S. 253 ; 2 M. & Scott, 609, S. C. ; 2 A. & E. 11 ; 3 M. & Scott, 373 ; 4 Dow. 374 ; Imp. Stat. 2 Wm. IV. ch. 39, sec 14 ; 1 C. M. & R. 19 ; 2 Dow. 690, S. C. ; 1 Scott, 387 ; 3 Dow 408 ; 1 Scott, 253 ; 3 Dow. 404 ; 4 A. & E. 485 ; 2 M. & W. 70. They relate to the entitling and date of the declaration, not the form of the Nisi Prius record in reference to continuances. The origin and meaning of the second *placita* is stated in Gilbert's History of the Common Pleas, pages 70 and 83, and his language is adopted in Sellon's Practice—cited by the plaintiff's counsel in argument.

I have examined the books of practice and forms, and it seems to me a second *placita* in a case like the present cannot be material or necessary.

Our own rules (Cameron's Rules, page 29), provide that no entry of continuances by way of imparlance, *Curia advisari vult*, *vicomes non misit breve*, or otherwise shall be made upon any record or roll whatever or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained : and No. 45 (Cam. Rules, page 64,) provides that

issues, judgments, and other proceedings shall be in the form afterwards given or to the like effect; No. 2 is then given as the form of a N. P. record, amended by form No. 2. in rules of H. T. 13 Victoria, No 40 (page 12 of the printed rules); the latter shews how the record should proceed after the pleadings are completed in relation to the *venire*, and at once directs the sheriff to cause the jury to come before the judge of assize. The former preserved the former course of respiting the jury in the court above, unless, &c. The present record is framed according to the original form, (Cameron's Rules, page 64, No. 2,) and like the form given it omits the second *placita*, but the proceedings are all in the same term, and the respite is only from the last day of the term, in which issue was joined to the next term, unless the judge of assize come in the interim. Sec. 45 of the R. H. T. 13 Vic. provided that the process and proceedings in actions of ejectment, dower and replevin, shall be and continue as theretofore; consequently it depends upon the propriety of allowing the forms originally given in the first set of the new rules.

The forms given in in Badgely's Practice, for all the counts in ejectment, show that it is considered correct practice to omit the second *placita* in such actions as well as others, and I perceive nothing to prohibit it or render it necessary. The case referred to in Q. B. U. C., is not, as reported, quite like the present; there, as I understand it, a term or more intervened between the joining of issue and the trial, creating a *hiatus* in the proceedings without the entry of continuances or a second *placita*, and respite of the jury of the term next preceding the trial; but if the jury were respited from the term in which issue was joined until that next succeeding the trial, unless, &c., I am not prepared to say it would be bad under the form given in the new rules, if it could be adopted in ejectment, because the blank following the word "afterwards," in form No. 2, might and perhaps ought to be within the term, or the last day of the term next before the trial—the last is, I suppose, intended. In the case before us, the jury are respited from the last day of the first term to the one next ensuing, &c.,

and I must say I think it sanctioned by the new rules and the practice in England, indeed (so far as I am aware), under a rule similar to ours.

On referring to the terms of the statute 12 Vic. ch. 73, under which I suppose the sale took place, I think the purchaser of the equity of redemption of all the estate, right, and title of the mortgagor, under an execution against this real estate, when the mortgagee is the plaintiff and the debt the same as that secured by the mortgage, creates a sufficient privity (in such a case) to entitle such mortgagee and plaintiff to the benefit of the judgment, as an estoppel, against the mortgagor and those claiming under him or claiming to have acquired all his estate and interest, under such judgment by virtue of the statute.

The defendant claims under the judgment—it is the foundation of his title, and renders him privy in interest; and if entitled to the benefit of it, it must be all taken together. The establishment of usury to defeat the mortgage would show the judgment itself wrong, and that no execution should have issued under it; if the defendant showed the judgment void, he might defeat his own title, which is supported by the judgment.

Still, from the cases on the subject which are numerous, I infer that matter of estoppel *in pais* may be proved, and being proved is conclusive without being pleaded, although there has been an opportunity; that estoppels by deed or record are not conclusive unless pleaded and relied upon, if there be an opportunity, but that if there be no opportunity such estoppels are also conclusive in evidence. Now here it could not have been pleaded; the estoppel is not set up by the defendant as a defence; the mortgage does not appear on the pleadings; it comes out in the plaintiff's evidence in chief. The defendant, by the terms of the consent rule, is only admitted to defend on the condition of his pleading not guilty, but in doing so the parties are permitted upon titles and upon titles only. The defendant was therefore precluded from pleading specially, and ought not to be prevented from proving a deed or record that estopped the plaintiff, having had no opportunity of pleading it. Then,

it being open to defendant to go into his title, or to impeach the title of the plaintiff by special matter in defence, the plaintiff could have no opportunity of replying an estoppel to anything he might be entitled to set up as a defence, and therefore ought to be at liberty to prove it in reply, where it would be conclusive with the jury in evidence, though not pleaded. I take this to be the clear rule, and that consequently the plaintiff had a right to urge the plea and issue of usury, found in his favor of record as conclusive upon Daniel Kelly the mortgagor, and if so, likewise conclusive on the defendant, who purchased his interest as such mortgagor under the same record. I do not see that the terms of the sheriff's deed could make any difference in the end; and going off, as the case did, upon questions submitted to the court at Nisi Prius by the defendant's counsel, I do not see any good reason for a new trial merely to find out its contents. Now, to look at it upon this application, would be virtually receiving evidence after the trial, and in strictness neither judgment against Daniel Kelly, the *fi. fa.*, or the sheriff's deed, are before us unless the judgment was proved or admitted at the trial, as I understand it was, in order to raise the question, and which without it could hardly be understood.

As to the 2nd point, the defendant not having given any evidence: The question comes before us in an abstract form; had he proceeded, he would have produced the sheriff's deed, and we should have known its contents, whether it professed to sell the estate absolutely, or all Daniel Kelly's interest therein, or only his equity of redemption, subject to the mortgages in question; he would also have proved the *fi. fa.* against lands, and its terms would have been seen. It might also have been incumbent upon him to have produced the judgment; as to which (this action not being defended by the defendant in the writ, though it is defended against the plaintiff, at whose suit the sale took place), 6 M. & S. 110, 5 Esp. 24, 2 Star. N. P. C. 199, Holt, N. P. C. 587, 2 C. & J. 71, 6 B. C. 41, may be mentioned. If he produced the judgment, he would himself shew that he claimed under it; if he did not, and the sheriff's deed did not convey

subject to the mortgages, he might be entitled to go into the defence of usury, in which event proof of the judgment would come from the plaintiff in his reply; but, however proved, whenever it appeared, it would show that the defendant purchased and held under it; and this I think, would establish a sufficient privity to entitle the plaintiff to rely on the estoppel therein contained, if admissible.

If not necessary that the defendant should have produced the judgment, (the *fi. fa.* and sheriff's deed being a sufficient title as against the plaintiff in such *fi. fa.*), I have not overlooked the consideration that the defendant's title may be independent of the judgment, so that, if reversed in error or set aside, the sale may nevertheless remain good—1 M. & S. 425; 6 M. & S. 110; 1 Q. B. 738.

DOE HENDERSON V. MCWADE ET AL.

A. being in possession of the west half of a certain lot of land as assignee of the vendee of the Crown, (no patent having issued), assigned the same to B., one of the lessors of the plaintiff, but continued in possession of the south-west quarter of the said west half; and having accepted from B. a written permission to occupy the same, afterwards disavowed his holding by such permission, and claimed to hold the same in his own right. During the period A. claimed to hold in his own right B. assigned the whole west half to C., the other lessor of the plaintiff.

Held, that the defendant A. having created the relation of landlord and tenant, to the extent at least of a tenancy at will, by accepting the written permission of B. to occupy, a subsequent disavowal by him could not create a holding so adverse to B. as to prevent B.'s assigning to C. without first obtaining possession by ejectment.

Ejectment for south west quarter of lot No. 8, 5th concession, Albion—a Clergy Reserve.

Declaration Hilary Term, 14 Vic.

The demise by Jane Henderson is laid the 1st January, 1844; the demise by Thomas McWade is laid the 4th January, 1850.

It appeared by the evidence and papers produced at the trial that no patent for the lot in question has yet been granted by Government, but that on the 25th September, 1834, the west half was sold by the then Commissioner of Crown Lands to Michael Henry for 62*l.* 10*s.*, being estimated at one hundred acres, at the price of 12*s* 6*d.* per acre, payable in ten yearly instalments, on the 29th Sept. in each year, of which the first, being 6*l.* 5*s.*, was paid

down. It was suggested, but not distinctly proved, that said Henry assigned his right to a brother of the defendant, who afterwards assigned to the defendant; at all events before any more money was paid, and before the month of December, 1843, the defendant was in possession of the whole west half of the lot. That on the 28th December, 1843, the defendant, in consideration of 5*l.* assigned the same absolutely to Jane Henderson, one of the lessors of the plaintiff, her heirs and assigns, for ever. The assignment has a seal to it, but it is not clear that it was sealed, as well as signed, by the defendant. It was proved to have been executed by his making a mark thereto. It has the appearance of having been twice witnessed, first by Thomas Shirty and Thomas Henderson on the left side, as witnesses to defendant's signature; then in the printed form it says, *signed, sealed, and delivered*, &c.; and again by those persons whose names are written on the right side below the wafer seal. Below is an affidavit of execution by Thomas Shirty, sworn 27th December, 1843, that he saw it *signed, sealed, and delivered*.

The defendant was the son-in-law of Jane Henderson; she had two other daughters, one named Ann, since married to the lessor of the plaintiff, McWade.

Jane Henderson entered into possession of the north-west quarter, and resided thereupon for some years: she afterwards removed to the County of Huron, leaving her then unmarried daughter Anne, and other children, upon the premises. Ann afterwards married McWade. On the 1st January, 1844, Jane Henderson paid the second instalment, 9*l.* 14*s.* 5*d.*, principal and interest, on the *west half* of the lot, at the Clergy Reserve Office; on the 9th August, 1847, the sum of 11*l.* 1*s.* 6*d.* in full of the third instalment. The Government office receipt is in the name of Henry, but the words "per Ann Henderson" are written under the date, in a hand-writing different from the rest of the receipt, which is a printed blank filled up in a different hand.

On the 1st March, 1849, sum of the 11*l.* 15*s.* 3*d.*, in full of the fourth instalment, is receipted as from Henry, but the words "paid by Thomas McWade" are written under the date, all apparently in the same hand-writing.

On the 1st February, 1850, the sum of 12*l.* 1*s.*, in full of the fifth instalment, is receipted as from Henry, the words "per T. McWade" being written under the date.

On the 3rd January, 1850, Jane Henderson executed under her hand and seal an assignment to Thomas McWade, (then) husband of her daughter Ann, his heirs and assigns, for ever, the whole west half of the said lot, the consideration therein expressed being 30*l.* to her in hand paid by Ann Henderson in the year 1845, the receipt whereof she thereby acknowledged, the defendant being at that time in the possession of the southwest quarter.

This was in effect the plaintiff's case.

The (defence which had been partly anticipated by the plaintiff in the evidence in chief) was, that although the defendant had assigned the whole west half to Jane Henderson, still only the north-west quarter was to become hers beneficially, the defendant retaining for his own use and benefit the south-west quarter. In order to establish this the defendant, beyond the mere fact of continued possession of that quarter, alleged and endeavoured to prove, that five or six years ago Jane Henderson had executed and delivered to him an absolute assignment in writing of the same, which writing had been afterwards abstracted surreptitiously, by her third (youngest) daughter from his, defendant's house, upon the premises.

The lessor of the plaintiff admitted that she gave a writing at the period mentioned, but asserted that it was a mere license to the defendant to occupy and cultivate the ground until she disposed of the premises, and denied that it had been stolen or taken away, as alleged. This paper writing not being produced, it was, on the defendant's part, asserted to be an absolute assignment of the south-west quarter; on the plaintiff's part, to be a mere permission to occupy. Its execution being admitted, the only contest was as to its contents, which appeared upon secondary evidence, and consisted of the statements of one of the two subscribing witnesses, (the other not being called by either side) and others who said they had read or heard it read. There was a good deal of evidence on the subject, more or less conflict-

ing shewing, however, that the parties were not on good terms ; that misunderstandings and quarrels had grown out of these transactions ; and that at the time Jane Henderson executed the assignment to McWade it was well known to her, and to him, and to his wife, that the defendant was in possession claiming to be entitled as her absolute assignee, although she asserted the contrary.

The case was tried by the Chief Justice of the Court of Common Pleas at the last assizes for the county of York, who left it to the jury to find for the plaintiff if satisfied that the absent writing was in fact only a permission to occupy until Jane Henderson sold or disposed of the property (or place) ; but for the defendant if not so satisfied, or if satisfied that it was an absolute assignment, as he contended ; the point was never left to them by the court upon the subject of adverse possession, although argued by defendant's counsel, the court being of opinion that if the writing he had received and accepted from Jane Henderson was a mere license at will, or until she sold the place he, could not (coupling it with his absolute assignment to her) set up an adverse claim under it, still claiming to be only entitled thereunder, so as to invalidate her assignment to McWade while he remained in possession under such circumstances.

The jury found a verdict for the plaintiff.

On Wednesday, the 4th June last, being the third day of term, *Bell*, for defendant, moved for a rule for the plaintiff to shew cause why the verdict should not be set aside and a new trial be granted as being contrary to law and evidence, and for misdirection, and on affidavits filed.

The court took time to consider the application, but granted a rule on the following day, the 4th ; it was however intimated in the absence of the defendant's counsel and attorney, and he not hearing of it, the rule was inadvertently omitted to be taken out, and not served till the evening of Thursday the 12th of June. The affidavit relates merely to the absence of witnesses who, for all that appears, might have been produced at the trial, had due measures been taken to secure their attendance.

Dempsey, for the plaintiff, shewed cause last term, and urged, in the first place, that the rule was not taken out in time; that the defendant had been guilty of laches, and the plaintiff was entitled to judgment.

Bell excused the delay, owing to inadvertence, and not hearing of the rule being granted at an earlier day.

The case was heard subject to this objection.

Dempsey contended the absence of the witnesses was mentioned in the defendant's affidavit, and most satisfactorily accounted for, and constituted no sufficient ground for a new trial.

That the alleged adverse possession of defendant did not affect the assignment to *McWade*; and if it did, that there being a demise in the name of *Jane Henderson* also, the defendant was entitled to recover on one demise or the other.

Bell, in reply, relied principally on misdirection in relation to the adverse possession of defendant as invalidating the assignment to *McWade*; and contended that the demise by *Jane Henderson* cannot prevail, owing to her having no right by her own shewing; at all events, that the question of adverse possession should have been left as a fact to the jury, and that if reduced to the single demise of *Jane Henderson* the other matters of fact ought to have been submitted to the jury, in relation to that demise also, which was not done: that at present the plaintiff has a verdict on two demises, and both cannot be right.

Doe. Gray v. Stanton, 1 M. & W. 695; *Doe Graves et al. v. Wells et al.*, 10 A. & E. 426; *Doe Dunn v. McLean*, 1 U. C. L. 151; *Doe McMillan v. Brock*, 2 U. C. R. 270; 6 U. C. R. 32; *Doe Williams v. Evans*, 1 C. B. 717; 9 Ju. 712 S. C. As to assigning contingent interests or rights, P. S. 7 Wm. IV & 1 Vic. ch. 26 sec. 3; J. S. 7 & 8 Vic. ch. 76 sec. 5; P. S. 12 Vic. ch. 71 sec. 5; P. S. 4 & 5 Vic. ch. 100 sec. 18 sec. 30; P. S. 12 Vic. ch. 31 sec. 2 sec. 8—see section 5, as to forfeiture; 7 Wm. IV ch. 118-117, 2 Vic. ch. 14; *Disseizin*, 2 D. & K. 40; *Tew v. Jones*, 13 M. & W. 12; *Howard v. Shaw*, 8 M. & W. 118; *Winterbottom et al. v. Ingham*, 7 Q. & B. 611; *Baxter v. Taylor*, 4 B. & A. D. 72.

That ejectment lies by *assignee* of vendee of the Crown before grant, by the terms of the statutes.

MACAULAY, C. J.—The estate is still in the Queen, and the lessors of the plaintiff both claim as assignees under the original vendee of the lot, being a Clergy Reserve. The sale to Henry on the 24th day of September 1834 preceded the statute 7 Wm. IV. ch. 108, (passed 17th May, 1838), which is the first on the subject of Crown sales. Section 17 provided that the official receipt for any purchase money therein mentioned should entitle the purchaser to take immediate possession of the lot sold, and to maintain actions of ejectment or trespass against any wrongful possessor or trespasser thereon in his own name, as fully and effectually as if the patent deed had issued to such purchaser. This act was followed by the 4 & 5 Vic. ch. 100, sec. 18, which authorized suits in law or equity against any wrongful possessor or trespasser.

The 7th Wm. IV. ch. 108, sec. 5, the 2nd Vic. ch. 14, sec. 1, and 4 & 5 Vic. ch. 100, sec. 30, relate to the registration of assignments, not applicable to this case, as none of the assignments have been registered.

The last act on the subject is the 12th Vic. ch. 31, the second section of which extended the 18th section of 4 & 5 Vic. ch. 100 to Clergy Reserve sales, section 8 relates to registration of assignments. The spirit of the 2nd section 12 Vic. ch. 31, would seem fairly to embrace all previous sales of Clergy Reserves, as well before as after, under the 4 & 5 Vic. ch. 100, although not made retrospective in express terms. I find one clause declaring that assignees of original vendees may bring actions before the issue of letters patent of grant, and both the lessors of the plaintiff here claim such assignees, it seems to follow here that as between the Crown and the original vendee Henry, he had a right to possess or occupy; and that having assigned, his right and possession having followed such assignment, the parties possessed as assignees under such assignment hold under the same claim of the Crown, and not as mere intruders or wrong-doers; and may, under such possession, maintain actions of trespass against any trespasser upon the premises, and I think ejectment also against any wrongful possessor; at all events, as between assignees and assignors, when the latter continue to hold contrary to

the effect, intent, and meaning of their assignments. See *Doe Watts v. Morris* (2 Bing. N. S. 189). Now in this case defendant (being in possession as assignee of his brother, who was assignee of Henry, the vendee of the Crown) assigned to the lessor of the plaintiff, Jane Henderson; he continued in possession afterwards, inconsistently with the effect of such assignment—(see 13 M. & W. 12), and she had clearly a right to bring ejectment against him; and the statute (Wm. IV. ch. 1, sec. 17) was running in his favour. In that state of things he accepted her written permission to occupy until she sold the premises, which converted his previous tortious holding into a rightful possession by her permission, and created the relation of landlord and tenant to the extent of a tenancy at will at all events.

The defendant's subsequent disclaimer and assertion of absolute ownership clearly entitled her to bring ejectment without any previous notice to quit or demand of possession.—*Doe Gray v Stanton*, 1 M. & W. 695; *Doe Graves et al. v. Wells et al.*, 10 A. & E. 427; 1 M. & G. 135-9.

But I do not think the defendant's declaration and conduct amounted to a disseizin, or such an ouster or adverse possession as deprived her of her right to assign to the other lessor of the plaintiff while defendant continued in possession, or without first dispossessing him by ejectment. The mere disavowal of a tenant in possession unattended with any transfer or change of possession, will not work a disseizin, and the tenant is estopped from disputing his landlord's title, under whom he entered. Now, defendant does not enter under Jane Henderson; but, having assigned to her, and accepted her permission to occupy, his position is equivalent to that of a tenant entering under her.—*Harper v. Charlesworth*, 4 B. & C. 592; *Baxter v. Taylor*, 4 B. Add. 72; *Doe Louter v. Hall*, 2 D. & R. 40-1; *Doe Higginbotham v. Burton et al.*, 11 Adol. & E. 807; 3 P. & D. 552; *Doe Williams et al. v. Evans*, 1 C. B. 717; 9 Ju. 712, S. C.; *Doe Dunn v. McLean*, 1 U. C. R. 157; *Doe McMillan v. Brock*, 2 U. C. R. 270; *Clark v. McInnis*, 6 U. C. R. 32.

THE QUEEN EX REL. ROSEBUSH V. PARKER.

Setting aside election.

The court will not set aside an election on the relation of a party who concurred in the election and voted for the person whose election he afterwards attempts to set aside.

A rule issued in this case, calling upon the relator to show cause why the judgment of Mr. Justice Draper, made and filed in this matter, should not be reversed, and the summons of the relator be dismissed with costs, on the ground that the application for the writ of *quo warranto* was made too late; that the relator acquiesced in the election of the defendant; and that, according to the affidavits filed, the township of Rawdon was entitled to elect a deputy town reeve.

MACAULAY, C. J.—As to the first point, it appeared that the defendant was elected deputy town reeve on Monday the 20th January, 1851, and that the application for a writ of summons in the nature of a *quo warranto* was made on Monday, the 3rd day of March, next ensuing, and the writ issued on the following day. The defendant appeared on the 18th of March by attorney, and endorsed on the statement filed by the relator, “to answer the grounds of objection to his election which are stated within.”

As to the second that the relator, who with the defendant and others had been elected township councillors for Rawdon, at the election held on the first Monday in January, was present at and voted for the election of the defendant as deputy town reeve, after having previously in amendment of the motion made in defendant’s favor, moved that another township councillor should be nominated, but which amendment, not being seconded, was not put. That defendant took his seat in the municipal council, as deputy reeve on the 27th January, 1851.

As to the third, that the assessment rolls for the year 1851 contained the names of 541 persons assessed for property, real or personal, of whom 453 appear thereon as householders and freeholders. Of the remainder 54 were heads of families, and resided in log houses, but were not assessed as householders because, the assessor thought log houses were not liable to be assessed.

The facts of the case are more fully set out in the lucid and able judgment delivered by Mr. Justice Draper, in chambers. I have the highest possible respect for the opinion of that learned judge upon any point he has attentively considered, and therefore express a different view with great diffidence and distrust of my own opinion:—

1st. I concur with that learned judge touching the time of application; I think that in the computation of six weeks the day of the election is to be excluded, whenever it follows that the application was made on the last day, but still within the time allowed. I have in a case before me in chambers expressed my opinion already that six weeks, at all events, is allowed to impeach an election, although the office may have been accepted more than a month; but that if the application be not made within six weeks, then the test is whether the office has been accepted more than a month previously.

2nd. Assuming secondary evidence of the contents of the assessor's and collector's rolls to be admissible, and that the court cannot revise the list of voters returned by the collector to the returning officer, by adding the names of freeholders and householders, appearing thereon merely as assessed for personal property, by adding thereto that they were also freeholders, or householders; it would appear that the township was not entitled to a deputy reeve *de facto*, as I may say, although they were *de jure*. In a case before me of Regina ex rel. Larkin v. Johnson, I expressed my opinion that a township councillor who had voted for a deputy reeve could not afterwards become a relator to set aside an election in which he concurred; in short to oust a party from an office in the alleged usurpation of which he was a participator; that is, when all the facts were known or susceptible of being readily ascertained, and no new information had been acquired that might not have been readily had before as well as after the election. Such appears to be the present case, and I feel bound to adhere to my opinion. The relator might have inspected the rolls before as well as after the election, for all that is shown; and it is against the English decisions, to allow a party under such circumstances

to become a relator. It is true that in England the question is always raised upon a rule nisi for an information in the nature of a *quo warranto*, and constitutes no question under the pleadings upon the trial of an information when granted; but here the writ is granted *ex parte* the relator's own case, and is virtually equivalent to a rule nisi; and the present writ on the face of it calls on the defendant to appear to answer and show cause by what authority he claimed the office of deputy reeve, which office, upon the relation of Joseph Rosebush, having, as he says, an interest in the election to the said office as a township councillor, the court was informed the defendant had usurped.

The cause he shews is, that the relator and others elected him thereto. This, I think, estops the relator from further objecting or showing that he had himself elected him to the office, although he had no legal right to do so; no one else complains, and the relator is not an aggrieved party, for whose relief the act intended to provide.

The form of the judgment (No. 1) shows that the relator's interest as alleged is in issue, and to be found; it is the first step in proceeding to adjudicate in his favor and against the defendant. The relator shews here that he had an interest in the election, but not adversely to the defendant; on the contrary, that he had exercised his interest in his favor, and now calls on the court to rescind his own act. I think the act contemplates a good and sufficient relator and entitled to impeach the election as being aggrieved thereby, not one like those characterized in 4 Bur. 2123 as first partakers, afterwards accusers—calling on the Queen to prosecute guilt of which they themselves are partakers. *Cole on Informations* 174-5; and the cases noted in *Reg. Rel. Larkin v. Johnson*. I think therefore the judgment should be reversed, without costs of this appeal, but with costs of the original application.

McLEAN, J., and SULLIVAN, J., concurred.

THE QUEEN v. STANTON.

A. having been appointed collector of customs, gave a bond to her Majesty, conditioned that he should in all things well and truly discharge his duty as collector, and account for and pay over all moneys which should come into his hands; and having received written instructions that all entries were to be made by him, all permits were to be granted and signed only by him, and payment of all duties to be made to him, except under certain circumstances. *Held per Cur.*—That having permitted the deputy collector rightfully to assume and perform duties entrusted to him alone, he was responsible under his bond for defalcations of the said deputy collector.

This is a *sci. fa.* In Hilary Term, 1851, (14 Vic.) on a bond made by the defendant to her Majesty, dated the 4th of August, 1843, in the penal sum^y of 1000*l.* The defendant demanded oyer, and the bond and condition were set out. The condition—after reciting that defendant had been appointed collector of customs at the port of Toronto, in Upper Canada—being, that if he should in all things well, truly, and faithfully discharge his duties as collector aforesaid, and should well and truly account for and pay or cause to be paid to the Receiver General of this province, or to such other person as should from time to time be authorized to receive the same, all moneys which he should receive and collect, or which might come into his hands by virtue of his said office of collector as aforesaid, to and for the use of her Majesty, &c. To which defendant pleaded, that he did in all things well and truly discharge his duties as collector and account for and pay over to the Receiver General all moneys which he received and collected, or which came to his hands by virtue of his said office, &c., whereupon the Attorney General assigned breaches:—

1st. That defendant continued in office until the 1st of December, 1849, and during that time received, to and for the use of her Majesty, divers large sums of money—to wit 300,000*l.*—which he had not paid over to the Receiver General.

2nd. That it was his duty as such collector well and faithfully to collect all duties of customs payable on goods imported into the port of Toronto; that he did not do so, but wrongfully suffered and permitted John Roy to collect said duties who was not authorized to do so, and that said Roy collected said duties to a large amount, which he did

not pay to the defendant or to the Receiver General, and which are wholly lost to her Majesty.

3rd. Similar to the last, except alleging that it was defendant's duty upon the 5th of April 1848 [date of customs act 10 & 11 Vic. ch. 34], and at all times thereafter, well and faithfully to collect said duties: that he did not do so, but suffered Roy to collect them, who had no authority.

4th. That it was defendant's duty well and faithfully to collect all duties of customs payable at the port of Toronto; that large amount of duties became and were payable, which defendant could, might, and ought to have collected, but did not; and said duties, through the negligence and carelessness of defendant, were not collected, but have been wholly lost, &c.

5th. That it was defendant's duty to enter clearly in a certain official book, called a daily register, a full description of all goods imported into said port, and duly entered at the custom house, and on which the duties had been paid, with the name of the importer, &c.: but that defendant did not make such entries therein, but wholly neglected so to do.

6th. That it was defendant's duty (except during his occasional, temporary, or unavoidable absence from his duties), personally to receive, examine, and pass all entries of goods imported into the said port, and entered at the custom house for payment thereof: but that defendant, knowingly suffered and permitted entries to be received and passed thereat without being examined and passed by him personally.

7th. That defendant continued in office until 3rd of April, 1848, (day on which 10 & 11 Vic. ch. 31, came in force), and long after that said port was a warehousing port, and defendant the proper officer to receive and pass, and it was his duty (except during temporary, occasional, or unavoidable absence) personally to receive, examine, and pass all entries of goods imported into said port, and entered for payment of duty, or to be warehoused; and all entries of goods taken out of warehouse and entered for payment of duties: that large amounts of goods were imported and entered for duty, and large amounts taken out of warehouse and entered for duty, but that defendant did not

personally examine, receive, and pass the said entries, but neglected so to do, and knowingly suffered one John Roy to receive and pass the said entries, who was not lawfully authorized so to do.

8th. That defendant continued in office till the 5th of April, 1848, and thence to the 2nd of November, 1849, and until the 1st of December, 1849 ; that an order of the Governor in council was passed, requiring all collectors of customs to make out their accounts quarterly, and transmit them within twenty days after the end of each quarter to the Inspector General ; and that the quarters should be the 5th of April, 5th of July, 10th of October, and 5th of January, in each year : and that for the quarter ending 10th of October, 1849, defendant did not make a true return, but on the contrary, knowingly made an untrue return.

9th. Similar in effect to the last, except that it charges the return to have been false, fraudulent, and incorrect.

10th. That it was defendant's duty to keep an official book, called a cash book, and enter therein, daily, all items of moneys received by him as such collector : and that although he did keep said official book, large amounts of money were received by defendant, which he did not enter therein, but wrongfully and fraudulently omitted so to do.

11th. Same in effect as the last, except that it does not allege the omission to have been fraudulent.

12th. Similar in effect to the 7th, but alleging that defendant allowed one James Hunter to receive and pass entries at the custom house.

13th. That it was defendant's duty to grant all warrants or permits for the removal of goods from the Queen's warehouses, and not to suffer or permit goods to be removed therefrom upon warrants or permits granted by any person not authorized to grant the same : but that defendant did allow goods to be removed upon warrants or permits granted by one John Roy, who was not authorized to grant them.

14th. That defendant did not attend at his office during office hours.

Rejoinder to breaches :—

1st. That defendant did pay to the Receiver General all

the said sums of money received and collected by him by virtue of his said office, while in such office—and issue.

2nd. That defendant did receive and collect all moneys due and payable for duties of customs; and did not wrongfully or knowingly suffer or permit said Roy to receive or collect the same—and issue.

3rd. That defendant did on the 5th of April, 1848, and at all times thereafter, well and faithfully collect and receive all moneys due and payable for duties of customs; and did not wrongfully or knowingly suffer or permit said Roy to receive the same—and issue.

4th. That defendant did well and faithfully collect and receive all duties of customs on goods imported into the said port—and issue.

5th. That it was not defendant's duty to make the entries mentioned in this breach, in the said book called a daily register—and issue.

6th. That defendant did not at any time knowingly suffer or permit any entries of dutiable goods to be received or passed without being examined and passed by defendant personally, &c.—and issue.

7th. That on the 5th of April, 1848, and at all times afterwards, defendant did personally receive, examine, and pass all such entries as are in said breach mentioned, and did not knowingly suffer or permit said John Roy to receive examine, and pass the said entries, *moda et forma*—and issue.

8th. That defendant did after the end of the quarter ending 10th of October, 1849, transmit to said Inspector General a true account, &c., of all moneys by him received and collected during the quarter, according to the form furnished, &c.—and issue.

9th. Similar to the last, alleging the transmission of a faithful statement, &c.—and issue.

10th. That defendant did enter daily in said cash book all sums of money, being for duties, received by him, &c.—and issue.

11th. Similar to the last—and issue.

12th That at all times on and after the 5th of April, 1848, defendant did personally receive, examine, and pass all

such entries as are in said (12th), breach mentioned, and did not knowingly suffer or permit said Hunter so to do—and issue.

13th. That defendant did not suffer or allow any goods imported and warehoused, &c., to be removed therefrom by the importers, under warrants or permits granted by said Roy, *modo et forma*—and issue.

14th. That defendant did attend daily at the coustom house during office hours, except on Sundays and Holy-days, &c.,—and issue.

The case was tried before Macaulay, C. J., at the last Toronto assizes, when a verdict was found for the Crown on all the issues except the 12th and 14th, which were found for the defendant.

During last term, *J. H. Cameron, Q. C.*, obtained a rule on behalf of the defendant, to shew cause why such verdict should not be set aside, on the grounds that it was against law and evidence, and for misdirection, and the rejection of evidence.

He relied principally upon the insufficiency of the evidence in support of the 1st, 2nd, and 3rd breaches ; and as he afterwards at the argument, gave up the objection of rejection of evidence, it is unnecessary to state that part of the case—the substance of the evidence on the part of the Crown was, that at a period before the date of the bond defendant had been appointed collector of customs for the port of Toronto, and continued in that office until December, 1849. That the establishment consisted of defendant, then head officer ; John Roy, surveyor of customs, the second officer ; landing waiters and clerks. That Roy was such surveyor during the years 1848 and 1849. That his office was on the first floor, and defendant's up stairs in the same building, in which was also a third office called the long room. That Roy gave security as such surveyor by a penal bond, dated the 21st of April, 1846, in the penal sum of 500*l.*, conditioned that he should well, truly, and duly account for and pay over all moneys that he should receive, or that should come under his power or control by virtue of his said office or employment to such officer, person, or body lawfully authorized to receive the same ; and should within

the respective periods then or thereafter to be limited and applied for that purpose, render just, true, and complete accounts of all his receipts, disbursements, and payments for, or on account of, or in any way relating to, or affecting his said office or employment; and should also obey, observe, perform, and fulfil all and every the laws and regulations and instructions then or thereafter to be lawfully made and in force for the regulation and government of his said office, and for the prescribing, assigning, and pointing out the duties thereof; and should also well, lawfully, justly, and honestly in every respect behave himself in the said office or employment, &c.

That a printed book of instructions, to the officers of her Majesty's provincial customs, prepared by order of the Governor General in 1844, was transmitted to, and received by defendant, with a printed letter prefixed, dated the 1st August, 1844, and addressed to the defendant by Mr. Dunscomb, an officer in the customs department of the Inspector General's office, informing him that such instructions were furnished for his guidance, and that he should observe the same, and strictly comply with the provisions and regulations therein contained. In the beginning these instructions are addressed to the defendant; the first article enjoins a compliance therewith, and that defendant was to take particular care that the officers under his survey exercised a proper and correct demeanor in the execution of their duties. Article second required his attendance in the custom house during the hours necessary for the accommodation of the trade and the despatch of business. Article "third—It is your particular duty to collect and receive all moneys due and payable to her Majesty on account of the revenue at your port; and your are carefully to account for all such moneys as shall come into your hands, arising either from duties or imports or from seizure, &c., by entering daily cash transactions and detailing accurately and distinctly every item of receipt, &c., in the following books, with which you will be furnished, &c. :—

" 1st. A daily register : 2nd. A cash book, in which you are to enter every item of receipt from whatever source the same may be derived."

Article fifth—all persons entering goods inward, whether free or dutiable, to be warehoused or taken out of the warehouse, to give two bills of entry, which you will authenticate by your signature—one to be retained and the other to be delivered to the surveyor, &c.

Article sixth—accounts to be made up quarterly, on the days stated in the breach. Moneys not to be accumulated beyond the amount for which the defendant and sureties were bound, but to be paid to the Receiver General, and without fail within twenty-one days after the last quarter day.

Article eighth—no credit to be given for duties, &c.

Article nineteenth—no collector will be allowed to act by or appoint a deputy, upon pain of dismissal and forfeiture of bonds.

Article twenty-first—the surveyor, or officer doing the duty of surveyor, is to assume the collector's duties during his occasional, temporary, or unavoidable absence from his duties; and to preserve the correctness of that accountability which was mutually confided to them, the collector was to make it one of his first duties upon his return to check the proceedings of the surveyor during his absence, and to test the same by his signature in proof thereof. By the instructions to the surveyor he was to exercise a joint responsibility with the collector as well as an independent responsibility in the conducting and in the general superintendence of the business of the department—the out-door business being more immediately his. One of the most material parts of his duty was, to see that all moneys received on account of duties or customs were duly entered in the collector's books; and as it was necessary to provide for the occasional, temporary, or unavoidable absence of that officer, that the public business might not be retarded thereby, the surveyor was in virtue of his office in such cases to discharge the duties of collector in addition to his own, with further provisions respecting the examination and approval of the collector on his return, as specified in his instructions, and with a reserve in favour of the appointment of some other person during the collector's absence on leave. He was to

assist the collector in making up his quarterly accounts, and in transacting any business of the department not incompatible with the particular duties of his own office. He was to see that all moneys arising from duties and other receipts, paid into the hands of the collector, were duly entered and accounted for. Upon receipt of the duplicate bill of entry, mentioned in the collector's instructions, he was to recompute the duties, and having ascertained that the correct amount had been paid, he was to enter the amount in his receipt book, and in which receipt book he was to insert the amount of duties received upon every entry; to be added up daily, be compared with the collector's books, and his signature be affixed to the collector's accounts in proof thereof. He was not to permit any goods to be landed, without a warrant or other proper document, regularly passed by the collector.

Article seventeenth says he is responsible for all moneys that might come into the collector's hands, and that his bond would be liable to be put in suit for any deficiency in the settlement of his accounts.

Article eighteenth. In case of any temporary or unavoidable absence of the collector, he was to discharge the duties of collector, taking care on the return of the collector to the office that the entries passed by him and all other matters transacted during his absence, requiring his examination and approval, should be presented to him without delay for that purpose, to put his initials if he assented to their accuracy.

Article twenty-fourth. He was to examine all official books kept by the collector, &c., being jointly accountable for any errors or omissions, &c.

Article twenty-fifth is couched in general and comprehensive terms.

In addition to the above was a letter written by Mr. Dunscomb, commissioner of customs, to defendant, dated at Montreal, the 15th of January, 1846, referring to some complaint that had been made against Mr. Roy, the surveyor, and of his dismissal; and impressing upon the defendant the importance of his prohibiting any officer under his

survey to take or receive duties, as duties could be properly taken only by himself, and at the custom house; and adding that any deviation from that rule, though it were to oblige parties, was too apt, as on the occasion referred to, to be rewarded by unpleasant observations. This letter was produced from the custom house during the trial, and is endorsed in the defendant's handwriting "No. 6, 15th of January, 1846, from Mr. Dunscomb, cautionary, referring to the charge against Mr. Roy."

There was evidence that on the 6th of October four separate entries of goods, by the same importer, had been made and the duties paid; but that three only had been entered into the books of the custom house, and the amount of such three only accounted for to the government in the quarterly return of 10th of October, 1849, these duties had been paid to the defendant personally, and the entry thus omitted not having been mentioned or accounted for until the omission was discovered by the government inspectors hereafter mentioned, formed the subject of investigation upon the issues raised under the 8th, 9th, 10th, and 11th breaches; but the defendant's counsel does not object to the verdict in relation to those issues, and it is therefore unnecessary to recite the facts minutely. This transaction is now only of importance in reference to the 1st, 2nd, and 3rd breaches, as to which the verdict was objected to. In support of the last mentioned breach a great deal of evidence was given to prove that during the years 1848 and 1849, while the defendant was present and in charge and superintendence of the custom house, it became and was the frequent and almost uniform and constant practice for importers of goods to make the original entries with Roy, the surveyor, pay the duties to him, and receive the permits from him without the instructions of or any reference to the defendant; that the defendant's cash book was made up merely from the daily reports of Roy, of the entries alleged to have been made with and of the sums received by him, without any independent information in the defendant's possession, otherwise obtained, whereby to test the accuracy of such returns; that during this habitual practice, Roy

with the defendant's knowledge received large sums of money for duties, amounting to many thousands of pounds, for various portions of which he failed to account; that he frequently withheld some entries wholly and reported others only partially, retaining and misapplying the moneys received by him for duties on the entries so withheld from his reports or returns to the defendant: that an investigation was instituted by order of the government in October, 1849, when various merchants of this city who had been requested so to do, furnished statements of the dates of entries and of the sums paid to Roy for duties during the period above mentioned, which statement led to the discovery of defalcations of money received by Roy of upwards of 1200*l.*, and by the defendant personally exceeding 300*l.*, the latter being the item already mentioned in reference to the 8th, 9th, 10th, and 11th issues. There was ample evidence of the whole or principal part of the business of making entries, receiving duties and granting permits having been transacted by Mr. Roy, clearly with the defendant's knowledge and tacit acquiescence, and of the defalcations alluded to; and the only question was, whether, inasmuch as the defendant had not actually received any of the moneys deficient on Roy's part, nor been proved to be aware of the breaches of trust he was frequently committing, he was responsible therefore as breach of duty or of his bond; and if so, whether he was liable to make good the deficiencies. It was not contended that the defendant was lawfully absent on leave, or that Roy was lawfully acting as collector on the occasion in question, or in defendant's absence, otherwise than in so far as some of the duties may have been received during the defendant's casual or temporary absence from the office at the moment, though present in Toronto and personally in charge of the office. Nor was there any proof that he was in fact absent when any of the entries and payments of duties were made, and it was the just and reasonable, if not the necessary inference, that he was actually present in or about the custom house when the principal part or all the entries were so made with Roy, without participating or taking any share in the transacting of such business.

It is not necessary to detect with more minuteness the evidence on which the crown relied, the case mainly turning on legal points.

In charging the jury in reference to the pleadings, issues and evidences, the learned Chief Justice left the case to them in the different issues in succession, commenting upon each, and in substance stated that he considered the defendant responsible under his bond for all such moneys as he knowingly and wrongfully permitted Roy to receive: that all moneys received by Roy for duties, while the defendant was present supervising the office—that is, in charge of the custom house at the port of Toronto, and not lawfully absent on leave, by reason of sickness or otherwise, or lawfully excused—were wrongfully received by Roy, so far as respected defendant's liability therefor, and he was responsible jointly or concurrently with Roy himself, as had been held the day before, on the trial of another case against the sureties of Roy, Roy himself having died since December, 1849: that, even if not liable to make good the amount, it was laches, and a dereliction of duty in him to allow the duties without control to be paid to and received by Roy in the face of the printed instructions and the letter in writing which had been proved.

That as between the Crown and defendant, Roy was not entitled to received the entries on the duties in question, while the defendant was personally in charge; but only in his lawful absence.

That Roy had no right to grant permits upon entries with and payments of duties made to himself without reference to the defendant when in charge, and if he did so with defendant's knowledge (of which there was abundant evidence), it was a dereliction of duty and a breach of his bond, that as to the quarterly accounts and payments to the 10th October, 1849: the item of the 6th October was an admitted breach of duty and of the conditions of the bond, (although the amount deficient, had since the discovery been made good to the Queen, by the defendant), and this even if the omission had been so far reasonably explained as to divest it of the character of actual fraud; but the

charge of fraud was nevertheless upon the evidence left to the jury.

That permits were granted by Roy for the removal of goods before the duties had been paid or secured, whether warehoused or bonded, or on ship-board, or on the wharf, was irregular and if, with the defendant's knowledge, privity, or connivance, it was a breach of duty and of the conditions of the bond.

That, with respect to blank permits—that is, printed forms furnished to the office by the government, and which on the face of them implied that they were to be signed by the defendant and the word “collector” being printed below the blank left for his signature; but which, in the numerous permits filled up and signed by Roy, the word “collector” was struck out and “surveyor” substituted—the learned Chief Justice said blanks might be legally entrusted to the surveyor and be used by him under certain circumstances; but that the question here and on the evidence was, whether he had been irregularly allowed the use of such blanks—not merely occasionally or on some reasonable emergency, but constantly, and to a degree which created not only a mere irregularity but an abuse; and if so, it evinced great negligence on the defendant's part, and rendered him responsible for a breach of his duty; for that he would not thus delegate all the principal and most important duties of his own office, and escape the responsibilities attaching to his station, by leaving them to be performed by subordinate officers. The learned Chief Justice did not distinguish between the case of a mere irregularity in the defendant's suffering the surveyor to take entries, accept duties, and grant permits under the circumstances proved, without regard to consequences prejudicial to the public interests, and the case of such irregularity not only being calculated to lead to, but actually leading to defalcations and loss of the public moneys,—for both were clearly proved.

The charge was objected to by the defendant's counsel, on the ground that the defendant was not culpable or responsible in relation to the entries and receipt of duties by Roy, nor in the permits granted by him, he being an inde-

pendent officer, responsible for his own acts and conduct, and it being legally competent to the defendant to entrust the performance of the duties in question to him, although likewise present.

Richards, for the Queen, shewed cause in Trinity Term, 1851, when the defendant's counsel said he relied on the objections to the verdict on the first, second, and third breaches. *Richards* said that the defendant's bond might be divided into two branches; that the first breach related to the second branch, and the others to the first; and referred to the provincial statutes 10 and 11 Vic. ch. 31, and 12 Vic. ch. 1, under which acts, he contended, the moneys were received partly by Roy, and partly by defendant; which again subdivided the case into two distinct questions: that although the statutes do not distinctly define the relative and respective duties of the collector and the surveyor, but speak of the collector or other proper officer, yet the printed instructions are explicit and clear in this respect referring to page 3 sec. 3, page 9 sec. 21, page 16 secs. 2 & 17: that each was required to give security—the collector, defendant's self and sureties, to the extent of 3000*l.*, and Roy, the surveyor, to the amount of 1000*l.*; and that the latter was only legally entitled to receive moneys in payment of duties when the defendant was absent, and that while present it was defendant's express duty to receive them; that allowing Roy to receive them knowingly was a virtual or tacit delegation of his own duty and authority, destroyed the checks which were intended in the appointment of a surveyor of customs, and that he was liable for the consequences.

Cameron Q. C., in reply—admitting he could find no case in point, or clearly bearing on the points—contended that as to the first breach the verdict was not warranted by the evidence; and if so that although defendant might be properly convicted on other issues, it would relieve the case *pro tanto* as between defendant and his sureties and the government; if it is divided that for Roy's defalcations defendant is not liable, or to make good the moneys lost through Roy's misconduct. He relied on the instructions,

page 9 sec, 21, page 14 and page 19, as shewing a separate and independent authority in the surveyor to act as he had done entirely on his own responsibility as a provincial officer; that he could clearly collect duties during defendant's temporary absence; that there was no proof that he was not casually absent at the time when each of the sums withheld and misapplied by Roy were received by him; that defendant was not bound to receive all duties at the peril of forfeiting his bond; and that it was no breach of duty to suffer Roy to receive them, even when he was actually present, and *a fortiori* when absent; in short, that defendant was not shewn to have been guilty of any dereliction or infraction of his duty in relation to the entries and the payments of duties made through Roy, and the permits granted by him and that the verdict, being had in part and against law and evidence and for misdirection, must be set aside in toto.

MACAULAY, C. J.—Salt. 18; Lane v. Cotton; 1 Vent. 238; Crok. Car. 491; The King v. Brooks, have some bearing on the points. But in the absence of authorities more distinctly applicable, it seems to me clear that it was emphatically the defendant's duty to have received the moneys paid for customs. His instructions, both printed and written, strictly enjoined it; and if so, his knowingly suffering the surveyor of customs habitually to receive them, whereby a loss of public moneys so received has been sustained, was a breach of duty on defendant's part, and therefore a breach of his bond; and that, as a consequence, he is liable to make good the losses incurred by reason of such breach of duty. It is not necessary on the evidence to view the case in any respect more favorable to the defendant; if it was, I should still entertain the opinion, that as between the Crown and defendant, the defendant constructively received (so far as essential to create a responsibility therefor) all those moneys for duties which while the defendant himself was present in charge, and ought to have personally received, he tacitly permitted Roy to receive. The defendant and Roy, in relation to the payments so sanctioned, were virtually joint accountants.—Gill v. The

Attorney General. The moneys were actually received by one with the consent of the other.—Com. Dig. debt. G. 1; 11 Crok. 92.

No objection has been raised to the form of the first issue; but the plea to the first breach virtually admits the receipts alleged, and relies on payment, over, whereas the plea should have denied the alleged receipts.

The case was tried and argued in banc. upon the legal merits, as if the onus was upon the crown to prove the receipt by the defendant of the moneys referred to and intended in the breaches. If the receipt was proved it was clear that the moneys had not been paid over or accounted for to a very large amount, and the only real question was whether received by defendant or not. By analogy to cases of master and servant, principal and agent, municipal officer and deputy, ship-owners and masters, and upon the relation subsisting between the defendant and Roy, I think the defendant is responsible to make good the losses sustained by the public revenue in consequence of his permitting the surveyor of customs to receive the duties in the irregular manner that was proved; and that the verdict on the 1st, 2nd, and 3rd breaches is warranted by the evidence. I do not think the 10 and 11 Vic. ch. 31, by the collector or other proper officer, can be construed to intend thereby to affect the duty previously resting on the defendant to collect the duties, &c.

If the multiplicity and increase of the business rendered it impracticable or inconvenient for the defendant personally to receive all the duties with the despatch necessary to accommodate the trade, he ought to have represented it, and solicited other assistance, or some arrangement that might have subdivided the duty, without being implicated in liability for moneys received by others; but it does not appear that he did so, or that it was necessary; for it would seem that Roy found time to receive the entries and duties, and to grant permits, in addition to his own proper duties, except in so far as they were neglected; and it was not shewn in what other way the defendant was occupied in the discharge of other official duties of paramount im-

portance or that were incompatible with the due discharge of that part of it which he seems gradually to have relinquished and entrusted to the surveyor of customs.

McLEAN, J.—On the argument during the present term the counsel for the defendant admitted that the evidence which was offered and rejected on the trial had been properly rejected, so that it is only necessary to enquire whether there was any misdirection, or whether the verdict is in truth contrary to law and evidence. These objections may be considered under the first head; for if there was no misdirection as to the defendant's liability for the moneys received and not paid over by Roy, the surveyor of customs, under the defendant, then the verdict cannot be said to be contrary to law, and there was abundance of evidence to prove the receipt of a considerable amount by Roy, which has never been accounted for. The learned Chief Justice of this court directed the jury that the defendant, as the head of the department in Toronto, was responsible for all moneys collected or received in his office, and that allowing the surveyor, a subordinate officer, to receive moneys, while the defendant himself was present, and to act as if he were at all times an independent officer, was a delegation of authority which amounted to a breach of duty, for which the defendant and his sureties were responsible. The charge was objected to on various grounds, but principally on the ground that Roy, by the instructions issued for the guidance of officers of customs, was entitled to receive duties without the control of the defendant, and that it did not appear but that the moneys were received by Roy during the temporary absence of the defendant from the office; that, as Roy was entitled to act in the receipt of moneys in the absence of the collector from any cause, he had a right to receive moneys though the defendant was in charge of the office, if he happened to be absent at any time, and that the moneys might have been received on such occasions.

I have no doubt that the charge of the learned Chief Justice was perfectly correct when he told the jury that the defendant must be held responsible for all moneys received

in his office while under his charge and that he must be considered in charge when in the office and superintending its duties. The collector at each port gives security for the faithful discharge of his duties, the first of which, as the name imports, is to collect all moneys payable for customs on goods at his port, and to pay over and account for the same. He cannot, while present and discharging the duties of his office, escape from his responsibility to collect and pay over such moneys, by allowing a subordinate officer to receive such moneys. If he would delegate to the surveyor of customs, the power at all times to receive moneys, the whole of that duty might be thrown upon that officer, and a collector might so far screen himself and his sureties, and throw the greater portion of the responsibility of his office upon an inferior, whose sureties might be wholly inadequate to meet such a charge. The duties of the several officers are prescribed by particular instructions from the government not regulated by any statute; and from these it manifestly appears that the surveyor of customs can only legally assume the duties of collector during the unavoidable absence of the collector. He has his own duties to perform under the instructions, and if, as a matter of convenience, the collector allows him to discharge any duty which he is himself usually expected to perform, he does so nevertheless subject to all the responsibilities which must attach to his own performance of the same duties. The collector may, if he thinks proper, appoint any clerk in the office to receive all moneys, but in receiving it such clerk would undoubtedly be only the agent of the collector, to whom the whole responsibility must necessarily belong. So the surveyor of customs, though an officer appointed with particular duties, if entrusted by a collector with the receipt of moneys, a duty which under his instructions he could only properly discharge in the absence of the collector, he can only be regarded as the agent of the collector and default being made in payment of such moneys, the collector must be held responsible. The surveyor of customs gave security for the due accounting for such moneys as he might receive, and this security was probably exacted to guard against

any defalcations which might arise in the paying over of any moneys received while in charge of the office in the absence of the collector. The security would no doubt be liable for any moneys received; they could not screen themselves by alleging that their principal received the money improperly or out of the line of his duty. The only question as to them must be, whether Roy did or did not receive and pay over certain moneys. But though Roy and his sureties would be liable, the defendant and his sureties would not be discharged. The verdict being in accordance with the charge, and the charge being correct, cannot be impeached as contrary to law; and as to the evidence, it will scarcely be urged that there was not abundance to support the verdict.

SULLIVAN, J., concurred.

Rule discharged.

MELLISH V. THE TOWN COUNCIL OF THE TOWN OF BRANTFORD.

Municipal council under the 12 Vic. ch. 81, in any by-law passed for payment of a debt, or creating a loan, must settle and direct to be levied a special rate for such purpose.

The municipal year under the same act begins on the 1st of January and ends on the 31st of December, and not from the day appointed for the municipal elections in one year to the same day of the next year.

A debenture issued by a municipal council under their corporate seal, and signed by the head of such corporation, for payment of a debt due, or loan contracted under a by-law which does not provide by special rate for payment of such debt or loan does not estop such municipal council from setting up as a defence to an action on the debenture the invalidity and nullity of such by-law.

The 117th section of the act relates to *all debts and interest lawfully incurred and becoming payable within the year.*

McLean, J., *dissentiente.*]

Writ issued 12th March—Declaration filed 20th March, 1851—Debt for 110*l*.

1st count states that defendants—to wit, on the 15th of May, 1850, by an indenture in writing then made by defendants of which, sealed with the common seal of the defendants, profert is made, the date whereof is the day and year aforesaid—covenanted with the plaintiff that they would pay him at the office of their treasurer at Brantford the sum of 100*l*. on the first of January then next. 2nd count, that defendants on the 1st March, 1851, were indebted to the plaintiff in 100*l*., for interest, &c., upon the money due from

the defendants to the plaintiff, forbore at their request for divers spaces of time, &c.

And 100*l.* for money found to be due from the defendants to the plaintiff on an account then stated between them; which two last mentioned sums of money were to be paid on request; whereby, &c., an action had accrued, &c., to demand the said several moneys, amounting in the whole to 110*l.*, being the sum of 110*l.* above demanded, to the plaintiff's damage of 110*l.*

Plea 1, to 1st count—*Non est factum* and issue. 2nd plea to the remaining counts—*Nihil debet*. 3rd plea to first count—That the said instrument was made and sealed as aforesaid after the passing of the act 12 Vic. ch. 81—to wit, on the day and year in the said first count mentioned, and was so made by defendants, being a Municipal Corporation incorporated under such act; and that the said instrument so made and sealed as aforesaid, was not made or given for the payment of any loan contracted by the defendants as such corporation or of any part of such debt or loan, nor for any debt *bona fide* due prior to the 1st of January, 1849, by the town of Brantford, for which corporation defendants were substituted, nor in substitution for any promissory notes or debentures, to pass as money, which at the time of the passing of the said act were in circulation. Verification.

4th plea to 1st count—That the said instrument therein mentioned was made and sealed as aforesaid after the passing of the 12 Vic. ch. 81,—to wit, on the day and year in the 1st count mentioned, and was so made by defendants, being a Municipal Corporation incorporated under the said act; and that the said instrument, so made and sealed as aforesaid, was made and given *for payment of a debt incurred by the defendants as such Municipal Corporation after the passing of the said act*, and that a special rate per annum, over and above and in addition to all other rates whatsoever was not settled in the by-law passed by the defendants for the creation of such debt, to be levied in each year, in payment of the debt so to be created, as by the statute is required. Verification.

5th, to 1st count—That the said instrument, so made and sealed as aforesaid, was made and given *for payment of a debt incurred by defendants as such Municipal Corporation after the passing* of the said act, and that a special rate per annum, over and above and in addition to all other rates whatsoever, was not settled in the by-law passed by the defendants for the creation of such debt to be levied in each year, in payment of the debt so to be created, as by the statute is required. Verification.

5th, to 1st count—That the said instrument was made and sealed after the passing of the 12 Vic. ch. 81—to wit, on the day and year last aforesaid—and was so made and given by defendants, being a Municipal Corporation under the said act, in payment of a debt incurred by defendants, as such corporation after the passing of the said act, and that no rate was settled in the by-law passed by the said corporation for the creation of the said debt, as by the said act is required. Verification.

6th, to last count—That the said account was stated after the passing of the 12 Vic ch. 81. of and concerning a debt incurred by defendants as such corporation after the passing of the said act, to wit, on the day and year last aforesaid ; and that a special rate per annum over and above and in addition to all other rates whatsoever, was not settled in the by-law passed by the defendants for the creation of such debt, to be levied in each year, in payment of the debt so to be created, as by the statute is required. Verification.

7th, to last count—That the account stated therein mentioned was stated by defendants after the passing of the 12 Vic. ch. 81, and was so stated of and concerning a debt incurred by them as such corporation, after the passing of the said act—to wit, on the day and year last aforesaid ; and that no rate was settled in the by-law passed by the said corporation for the creation of such debt, as by the said act is required. Verification.

Replication.—Similar to 1st and 2nd pleas ; to 3rd plea takes issue ; to 4th, 5th, 6th, and 7th, demurrers, separately.

Causes specially assigned as to the 4th and 5th pleas respectively : 1st—that the said plea contains no legal defence

or answer to the first count of the plaintiff's declaration, and is repugnant and inconsistent with itself, in averring that the instrument therein mentioned was made and given by defendants for a debt incurred by them, and denying that there was a sufficient consideration for the said debt.

2nd—And that the defendants have not in and by the said plea denied the said instrument to be their deed, nor in any manner shewn that they were discharged therefrom.

3rd—That the defendants are estopped from pleading the matters set forth in the said plea, &c.

Cause of demurrer to the 6th and 7th pleas.

That the said plea contains no legal defence or answer to the said last count; that it is repugnant and inconsistent with itself, in averring that the account averred to have been stated was stated of and concerning a debt incurred by defendants, and denying that there was a sufficient consideration therefor, &c.

Defendants joined in demurrer.

Dr. Connor, Q. C. for the demurrer, contended that each of the 4th and 5th pleas allege three facts, and that all those demurred to involve one question; that the proviso to sec. 177 of 12 Vic. ch. 81, relates only to debts created by loan, and so to be created. He referred also to sections 61 & 81, Nos. 7 & 8, and schedule B., also to sec. 182, authorizing the issuing of debentures; that the pleas only argumentatively allege any by-law on the subject and incorrectly plead what it does not contain, instead of shewing what, if any, it does contain: wherefore it does not appear to be a debt created by a by law within the statute, or that it is a special and not an ordinary debt, not requiring provision for its payment by a special by-law; that, even if the by-law was wanting or invalid, it does not follow that the deed is, which must be presumed to be founded on a valuable and executed consideration, and nothing should be presumed against it—11 Bevan, 130; *Atty. Gen. v. Corporation of Litchfield*, (1 Taylor's Evid. 87): that the municipal year did not end until after the 1st January, 1851—see 13 & 14 Vic. ch. 67, sec. 10 & 114; 20 L. J. N. S. M. C. 11; 12 Vic. ch. 81, sec. 198.

Vankoughnet for defendants, contended, that although the pleas were not very full, they shewed the action to be for a debt founded on a debenture, without any by-law to warrant its issue or to provide for its redemption; that the demurrer is virtually general the special causes being immaterial—18 L. J. N. S. S. C. as in *11 Bevan* in appeal; that no covenant or debenture can be executed to bind the defendants for a debt contracted since the 12 Vic. ch. 81 came into operation, unless authorized by a by-law containing the provisions required by that statute; that the present deed on the face of it, as declared on, imports a special debt—a debt not due but to be paid at a future day—it therefore creates a debt for what consideration not appearing, and without any by-law being stated, or any such as the statute requires being shewn; that the 183rd section operates against the right to give debentures, unless in the excepted cases, of which the present is not shewn to be one.

MACAULAY, C. J.—The statute 12 Vic. ch. 81. sec. 198 at the end, enacts that all debts, lands, obligations, and other instruments to be executed on behalf of any corporation created under that act shall be valid, if sealed with the seal of the corporation, and signed by the head of such corporation, or by such other persons as shall by any by-law to be passed in that behalf be authorized to sign the same on behalf of the corporation.

Sec. 176 provides for debts contracted previous the 1st of January, 1850; and sec. 177 enacts that it shall be the duty of the municipal corporation to cause to be assessed and levied on the whole ratable property in their counties cities, towns, &c., a sufficient sum of money in each year to pay all debts incurred or which shall be incurred, with the interest which shall fall due or become payable within the year, and that a by-law thereafter to be passed for the creation of any such debt, or for the negotiation of any loan, shall not be valid or effectual to bind any such municipal corporation, unless a special rate per annum, over and above and in addition to all other rates whatsoever, shall be settled in such by-law, to be levied in each year for the payment of the debt to be created.

by the loan to be negotiated, nor unless such special rate shall be sufficient according to the amount of ratable property in such county, city, town, &c., as shall appear by the then last assessment returns, &c. to satisfy and discharge such debt with the interest thereof, within twenty years from the passing of such by-law.

Sec. 81, which prescribes the powers of town councils, enables them to make by-laws, among other things, for erecting certain public buildings, the purchase of lands, &c.; and by section 5, for assessing the proprietors of real property in certain localities to be benefited by special improvements; by number 7, for borrowing, under the restrictions and upon the security thereafter mentioned, all such sums of money as should or might be necessary for the execution of any town work within their jurisdiction and the scope of the authority by that act conferred upon them; and by number 8, for raising, levying, and appropriating such moneys as might be required for all or any of the purposes before mentioned, by means of a rate to be assessed equally upon the whole ratable property of such town, according to any law in force concerning rates and assessments.

Now the present action is brought upon a debenture or deed under the seal of the defendants, made on the 15th May, 1850, whereby they covenanted to pay to the plaintiff 100*l.* on the 1st of January, 1851, the consideration for such undertaking not being stated or appearing; also for 100*l.* for interest due on the 1st March, 1851, upon moneys due from the defendants to the plaintiff, and 100*l.* due on an account then stated between them.

The 4th plea to the 1st count states—

1st. That the instrument declared on in the 1st count was made and sealed after the passing of the 12 Vic. ch. 81, by defendants, being a municipal corporation under that act.

2nd. That it was so made, sealed, and given for payment of a debt incurred by defendants as such municipal corporation after the passing of the said act.

3rd. That a special rate per annum, over and above and in addition to all other rates, was not settled in the by-law passed by defendants for the creation of such debt, to be

levied in each year, in payment of the debt so to be created, as by the statute required, &c.

The 5th plea to the 1st count states—

1st. That the instrument was made and sealed by defendants, being, &c., after the passing of the 12 Vic. ch. 81.

2nd. In payment of a debt incurred by defendants as such corporation.

3rd. And that no rate was settled in the by-law passed by defendants for the creation of such debt, as by the act required.

The 6th plea to the last, or account stated, is similar to the 4th plea, and the 7th to the last count is similar to the 5th plea; all are in confession and avoidance.

The grounds of demurrer are—

1st. Generally, that the pleas contain no legal defence or answer to the action.

2nd. That they are repugnant and inconsistent, admitting the grounds of action stated, and yet deny that there was sufficient consideration or foundation for the debts demanded.

3rd. That defendants have not denied the same, and are estopped.

Several questions present themselves in reference to the 177th section, such as—

1. Whether the expression “debts incurred or which shall be incurred” includes antecedents or old debts, or relates only to debts incurred within the year, but before the levying of the rate or afterwards, within the same year.

2. Whether “the year” within this section means from the 1st January to the 31st December in each year, both inclusive, or from the day appointed for the municipal elections—namely, the first Monday in January in one year to the first Monday in January of the following year.

3. Whether the provisions therein mentioned and contained, respecting by laws for the creation of debts or for the negotiation of loans, are intended to apply to loans exclusively, owing to the words “debts to be created *by* the loan to be negotiated,” or to all debts incurred or to be incurred after the act went into operation, and as if the word “*by*”

had been "*or*," when it it would have been "debts to be created *or* the loan to be negotiated."

(1.) The first question is created by comparing section 177 with the previous section 176, which in itself contains express provision for raising the necessary funds to pay off all old debts or debts incurred previous to the 1st January, 1850; wherefore, if the word "*incurred*," in the 177th section, relates to the same debt, its provisions in relation thereto are superfluous; and of any debts *incurred* after the 1st January, 1850, it may be said they are embraced within the words "*or which shall be incurred*," the statute operating from that day; and that as to any debts incurred after that period, provision for the payment thereof was to be made in the by-law creating or authorizing it.

My impression is, that the word "*incurred*" relates to all lawful debts at whatever period contracted and the interest thereon that became due within the year, and for which no other special provision was made; also, that the words "*which shall fall due or become payable within the year*," relate as well to debts incurred or to be incurred as to the interest, and embrace all debts or interest lawfully incurred and becoming payable within the year.

(2.) The second question is created owing to the periods "*appointed for the annual municipal elections*," &c., and the argument that the first part of the 177th section, in using the words "*incurred or which shall be incurred*," should be construed to mean incurred within the year or to be incurred within the year, and for which a yearly rate is thereby required to be levied, which yearly rate ought to be governed by the time appointed for the election, or when the members of the council were to be changed—in short that the period of elections, &c., established a municipal year, commencing on the first or third Monday in January, as distinguished from the year of our Lord or the "*calendar year*," as it is expressed in the 12 Vic. ch. 78, sec. 16.

On referring to the 144th section of the 12th Vic. ch. 81, as to the 13 & 14 Vic. ch. 67, sec. 10, which (though passed since the making of the covenant or debenture declared upon in the first count in this cause, but prior to the time

laid in the last count) explains what constitutes the fiscal year under the assessment and municipal corporation laws, I am inclined to think that the year mentioned in the statute (12 Vic. ch. 81, sec. 177) is to be reckoned from the 1st January to the 31st December, both inclusive, and not from the first or third Monday in one year to the first or third Monday in the next succeeding year.

(3.) The third question arises not only by reason of the words "debts to be created by the loan to be negotiated," but by comparing section 177 with section 178, which applies expressly and only to debts contracted for loans of money, and the 11th section of the 13 & 14 Vic. ch. 64, which very much resembles it, though not quite so distinctly expressed.

But, considering that negotiating loans is only one mode of incurring or creating debts, and that the municipal council are empowered to contract debts for other legitimate purposes, and that the 177th section speaks of by-laws for the creation of any such debt or for the negotiation of any loan, the words "such debt," referring to the previous words "all debts incurred or which shall be incurred," if not necessarily restricted to the latter—namely, debts which shall be incurred—and referring to the saving clause, sec. 14 of the 13 & 14 Vic. ch. 64, respecting certain by-laws passed under the 12 Vic. ch. 81, sec. 177, which speaks of any debts created by loan or otherwise—I am induced to infer that the clause in question was intended to comprehend all debts lawfully created or to be incurred, and for the payment of which funds did not exist or had not been otherwise provided.

Under the 12 Vic. ch. 81, secs. 182 & 198, the covenant or deed declared on in the 1st count would be *prima facie* good, as it might in fact have been lawfully made by the previous corporation, or by the defendants, the new corporation, to secure and old debt or a debt contracted between the 1st January, 1849 (or between the 30th May, 1849, when the 12 Vic. ch. 81 was passed) and the 1st January, 1850, when it came into operation, when the present municipal corporation came into existence. It may, however, have

been for a debt contracted between the 1st of January, and the 15th of May, 1850, the alleged date, without any rate being provided in the by-law creating it; but that could not be intended to invalidate the instrument, for there may have been a by-law providing such a rate: but in these pleadings there seems no room for any intendments in its support, for the debt is alleged to have been incurred by the defendants, which it could not be if it was an old debt incurred before the 1st of January; and it seems a necessary inference to these pleadings that the debt was created by the instrument itself, or contracted since the 1st of January.—See 12 Vic. ch. 81, sec. 114 and sec. 167.

This debt, though contracted in 1850, not being payable within that year, the defendants were not bound to raise a sum in that year to pay it, under the foregoing provision. It is made payable in 1851, and if valid, the defendants would be bound to raise a sufficient sum this year—i.e. 1851—to discharge the debt and interest. The objection is, that being a debt contracted or created in 1850, to be paid in 1851, which is another fiscal year, the defendants are not bound to pay it for want of a by-law imposing a rate for its liquidation, passed concurrently with its creation; that, being a debt incurred in one year (1850) payable in another (1851), without the by-law passed for its creation having provided a special rate to be levied in the years 1850 or 1851 for its payment, there are no funds to meet it, and could have been none at the day appointed for payment, unless realized in the year 1850, and that therefore the by-law, if any, is invalid and ineffectual to bind the defendants to raise funds or to pay the debt in 1851; and as a consequence, that the covenant to pay, if not in itself a by-law within the 177th section, and the only by-law in point of fact, is equally invalid and ineffectual to bind them. I am constrained to take this view of the case. If the debenture or covenant is unsupported by a sufficient by-law, I think it invalid. I cannot satisfactorily distinguish between a debt payable at a future day and in a future year, created by or under a by-law or by a covenant or deed under the corporate seal, as respects its binding efficacy upon the defendants, in the

absence of any prospective rates for the payment of such debt when it became due. I have not failed to reflect upon the distinction suggested, but cannot say that I perceive any substantial difference. If the by-law failed to bind, the debt would fail; and if the debt failed, so the security or undertaking for its payment would fail; for if not, the objects contemplated by the legislature in requiring such by-laws might be readily frustrated. If the present covenant is binding, it might as well have been for 1000*l.*, payable ten or fifteen years hence with interest yearly, without any provision for meeting either the principal or interest—the very result the statute meant to provide against. As the debt became payable on the 1st of January, 1851, one test is whether the defendants are bound or empowered under sec. 177 to levy a rate this year (1851), to pay off the demand. The general rules seem to be, that corporations of this kind cannot in this manner anticipate the rates, (*Rex v. the Justices of Flintshire*, 5 B. & A. 761), nor making standing rates (1 Sal. 526, 532), although authorized in Upper Canada to do so for a period of twenty years by the statute in question (sec. 177); and that however rates may be made prospectively, (6 T. R. 580), they cannot be made retrospectively—5 B. & A. 761; 12 East. 556; 7 B. & C. 314; 2 M. & W. 777; and see the imperial statutes 5 & 6 Wm. IV. ch. 76, sec. 92; 6 & 7 Wm. IV. ch. 104, sec. 1; and 7 Wm. IV. and 1 Vic. ch. 78, sec. 28; all of which render it very questionable whether a retrospective rate can be levied in a future year, specifically for the payment of debts incurred in a former year, since the 1st of January, 1850—that is, since the new corporation came into existence.

The provincial statute 12 Vic. ch. 81, secs. 175, 176, and 177, require the corporations created under that act to take charge of any debt due by the locality over which they have jurisdiction, and to levy by tax upon the same (sec. 176), or to assess and levy upon the whole ratable property (sec. 177) a sufficient sum in each year to pay all debts, with the interest, which shall fall due or become payable within the year. The present, however, not being a debt due by the locality before the creation of the present corporation, but

incurred since, it depends not upon sec. 176, but upon the prospective provisions of sec. 177, in relation to debts to be incurred thereafter.

Then, as to future debts—that is, debts contracted after the defendants became a constituted municipal body—the statute evidently intends that such debts shall only be incurred or sanctioned by by-laws, and moreover, that no by-laws for the creation of any debt, which after the 1st of January, 1850, *shall be* (in contradistinction to *which had been*) incurred, should be valid or effectual to bind the corporation, unless a special rate per annum should be settled therein, to be levied yearly for the payment thereof. It is said the by-law mentioned in the statute not only relates exclusively to loans, but to debts payable in future years, as evinced by the terms “*to be levied in each year,*” which import successive years, and not to debts that become payable within the same year in which they are contracted, and for which a single rate was to provide, according to the first portion of the 177th section, and that great inconveniences must attend a contrary construction. This contingency has induced to me to hesitate and ponder upon the subject, but I am not able to adopt the view suggested. No doubt, if my impressions are correct, the restriction imposed in sec. 177 may occasion inconvenience in relation to ordinary, casual, or incidental matters, not anticipated or carefully provided for by previous estimates or by-laws; but still I cannot adopt the conclusion, that the clause extends only to loans or debts incurred on credit and to be paid in after years; and if it did, it would still embrace the present case, in my construction of the word “year.” It is not for the court to vindicate the law, if rightly interpreted, on this head. Nevertheless, it may be observed, that the inhabitants of the town of Brantford constitute the corporation, and are virtually the defendants, and that the members of the council are in effect their trustees empowered to execute trusts, in which those who compose a governing or administrative body are not beneficially interested in a pecuniary point of view, in the same manner that the directors or managers of trading and some other corporations are; wherefore the

legislature, for the double purpose of protecting the inhabitants or rate-payers, and the funds of the town on the one hand, and the creditors or persons contracting with the corporation on the other, imposed and required, by way of safeguard and security, the special rates specified in the 177th section. Of course it has not escaped notice, that one check intended is liable in a great measure to be defeated by the power conferred to contract large debts in any one year, and to provide for their payment by a prospective rate, spread over any term of future years not exceeding twenty, and there is apparent inconsistency so far; but in other respects the provisions adopted may be very expedient and salutary. And the Act obviously requires, in the execution of the powers it confers, great care and circumspection in the form and manner of estimating, apportioning, and levying rates, not only for the satisfaction of debts created by loan or otherwise payable at future years, but also in relation to the ordinary yearly rates to be assessed and levied for the ordinary or incidental expenditure of the current year under sec. 177.

The 13 & 14 Vic. ch. 67, sec. 11, contains a provision material to be observed in the future imposition of taxes or rates, and the remarks of the Master of the Rolls in the *Attorney General v. The Corporation of Lichfield* (17 L.J. C. 472) are not inapplicable. He said (page 130), "I think that upon a true construction of the municipal corporation act (5 & 6 Wm. IV. ch. 76) it is the duty of corporations to provide, as far as they can, within the year for the expenses of the year, by securing by means of a rate, if other lawful means are insufficient, such an income as upon a proper estimate may be found necessary, and that they ought not to contract debts to be paid in future years for the purpose of avoiding in the current year to provide for the expenses then incurred. I conceive that the rule is very important to be observed, and that the departure from it habitually or frequently would be very inconvenient, and would probably lead to future burdens of an indefinite amount and of great prejudice to the corporation."

So here might the accumulation of debts contracted,

without provision for their payment by means of the recourse afforded, upon executions under 12 Vic. ch. 81, sec. 177.— See *Jones v. Johnson et al.*, 20 L. J., N. S. 11. Where the statute (sec. 177) not so stringent in its terms, the case of *Holdsworth v. The Mayor &c. of Clifton* (11 A. & E. 490), and the late case of *Pallister v. The Mayor of Gravesend* (19 L. I. C. P. 358), would be much in point in support of the action, especially the latter, but the distinction between our statute and the imperial statutes referred to in that case are obvious. In ours we find expressed the very prohibition that was there contended to be implied, but which was held not to exist. Taking this action to be brought for the recovery of a debt or debts (incurred on any account) since the defendants became a corporation, either without any by-law to authorize the contracting or any by-law setting the yearly rate for the payment of such debt or debts, it appears to me the defendants are not liable, and that the want of a sufficient by-law may be pleaded, if not in the nature of a special *non est factum* or never indebted, at least in confession and avoidance.—5 Co. 119; *Thompson v. Rock*, 4 M. & S. 338; *Harmer v. Rowe*, 6 M. & S. 146; *Hill v. Manchester and Salford Water Works Company* 2 B. & Adol. 544; 5 B. Adol. 866, S. C.; *Pontet v. Bassingstoke Canal*, 3 Bing. N. S. 433; *Paxton v. Popham*, *Downing v. Chapman*, *Pole v. Hanobin*, 9 East. 408, 416; *Wigg v. Shuttleworth*, 13 East. 87; *Jones v. Woollam*, 5 B. & A. 769. The objections apply with equal force to both the first and last counts, even if the account stated is assumed to have been under the seal of the corporation and founded upon other considerations than in the deed stated in the first count.—The Mayor of *Ludlow v. Charlton*, 9 C. & P. 242; 6 M. & W. 815, S. C.; *Regina v. Mayor of Warwick*, 8 Q. B. 926; *De Grave v. Corporation of Monmouth*, 4 C. & P. 111. The question remains, whether the omission of a rate settled in the by-law is sufficiently pleaded. I think the pleas impliedly allege a by-law or by-laws, but without setting out the same, to shew what they do contain—they merely indirectly assert what they do not contain. No ground of special demurrer has however been assigned in this point, if objectionable.

Some authorities bearing on this point will be found in 1 Sid. 50 pl. 13 ; Ib. 97 & 425 ; 6 Mod. 237 ; 2 Sal. 498 ; 1 Stra. 227, 10 Co. 88, 92 ; 1 Saund. 317, (2) b. ; 2 Saund. 409 (2) ; 4 East. 340 ; 13 East. 87 ; 8 M. & W. 720 ; 15 M. & W. 48 ; 1 A. & E. 795.

I have hesitated a good deal in considering whether the pleas are not liable to the objection of not sufficiently shewing whether there are any by-laws on the subject of this debt other than the deed declared on in the 1st count, and if any, what provisions they contain, so as to shew forth to the court that they do not settle any rate, as required by the 177th section, instead of simply negating that fact ; but the best opinion I can form is, that on general demurrer it must be intended that there are by-laws to which the pleas refer, although not distinctly averred, and that such by-laws do not contain any provision for either a single or a yearly rate for the payment of the demands specified in the first and last counts.

I cannot satisfy myself that, although within their own knowledge and under their own control, it was incumbent on the defendants to set out the by-laws in full, or that it is not sufficient for them to allege that the by-laws do not settle the rates required by the 177th section. If there were by-laws such as the statute directs, the plaintiff might have stated them in reply, being open and accessible to him, although in the defendants' custody (12 Vic. ch. 81, sec. 199), and takes issue upon the facts. Instead of doing so he demurred, not on the ground of uncertainty in this respect, but of the defendants being estopped by their deed, or liable on the face of the declaration, notwithstanding the alleged omission or defect in the by-law or by-laws passed for the creation of the debt or debts for which the action is brought. Upon the whole, therefore, in my opinion,

1st. The pleas do contain a legal defence to the action ;

2nd. And are not repugnant, admitting as they do the due execution of the deed, but denying liability, on the ground that it is invalid and not binding upon them, for the reasons therein stated. I do not think the admission being explicit, makes any material difference, or that the intro-

duction of the word “supposed” before the word “instrument,” &c., (as in the plea in the case reported in 4 M. & W. 621) would have qualified the admission in any material degree, for the word *supposed* has been held equivalent to *alleged*, and a sufficient confession in a plea confessing and avoiding.—*Gale v. Carpen*, 1 A. & E. 46; 3 N. & M. 863, S. C.; *Gould v. Lasherry*, 4 Ty. 865; 1 C. M. & W. 154, S. C.; 5 Ty. 64; 4 A. & E. 489; *Eavestaff v. Russell*, 10 M. & W. 366. The pleas only admit the instrument or the debts *sub modo*, and in order to avoid them by new matter, the consideration for the debt in question—whether work, labour, and materials, money lent or otherwise—is not stated by either party: all we have is the deed or covenant to pay at a future day, and the account stated payable on request, founded upon some presumed considerations, without such debts being provided for by settled rates in this by-law authorizing or creating the same.

3rd. The defendants do not deny their being indebted, except as the legal inference from what they state—viz., facts shewing that they never were bound legally, either by the covenant or account stated, which last may consist merely of the admission contained in the former, and which might have been thereby supported in evidence if traversed.

4th. Lastly, the defendants are not estopped, the doctrine of estoppel not applying when the deed or subject matter is attacked upon some collateral ground, shewing it illegal, void, or not binding in law. On the whole, therefore, I think judgment should be for the defendants, although I express this opinion with much diffidence, the whole subject of municipal corporations, their by-laws and the statutes under which the defendants were created being new to me. We have not hitherto been called upon to consult and become familiar with the English decisions respecting rates and assessments for local or occasional purposes, and I have not met with any case resembling the present, nor am I aware of any imperial statute containing a restrictive proviso like the one in question, although there may be such. Without the aid or guidance of precedents or authorities more in point than those I have seen, I cannot but

entertain the opinion, however repugnant to the apparent justice of the plaintiff's case, that the omission to comply with the proviso deprives the deed declared upon, and on the same principle the alleged account stated of its valid and binding effect upon the defendants, and that judgment should therefore be against the demurrer.

Since writing the above, I have seen the act passed last session (30th August, 1851,) to enable municipal corporations in Upper Canada to contract debts to the crown, in the purchase of public works, without imposing a special rate or tax for the payment of the same, and it clearly shews that the proviso in section 177 is correctly interpreted, as relating to all debts incurred by the municipal corporations, whether for loan or otherwise.

McLEAN, J.—The writ in this action appears to have been sued out on the 12th day of March, 1851, on an instrument under the seal of the corporation, dated 15th May, 1850, payable on the 1st day of January, 1851. By the 198th section of 12 Vic. ch. 81, under which the corporation which gave the undertaking in question was elected and acted, it is enacted that all debts, bonds, obligations, and other instruments, to be executed in behalf of any corporation elected or to be elected under that act, shall be valid if sealed with the seal of the corporation, and signed by the head of such corporation, or by such other person as shall, by any by-laws to be passed in that behalf, be authorized to sign the same on behalf of the corporation.

In all the pleas the defendants admit the making of the instrument or the incurring of the debt by them since the making of the act of 12th Vic. ch. 81, but seem to rest their defence on the alleged fact that a special rate per annum, over and above and in addition to all other rates whatsoever, was not settled in the by-law passed by the defendants for the creation of such debt, to be levied in each year in payment of the debt so created, as required by the statute. There is no distinct allegation, as there ought to be, that a by-law was in fact passed to create this debt; but the making of such by-law is left to be inferred from the statement that in the by-law passed to create the

debt no special rate was settled for its payment. The plea should not only have alleged in positive terms that the debt was created by a by-law, but it should have set out the by-law, so that it might appear that the provisions required by law were not contained in it. But it is not objected to on this account; and we must confine ourselves to the objections which are set forth in the special demurrer—the first of which is, that the pleas contain no legal defence or answer. By the 198th sec. 12 Vic. ch. 81, the instrument declared on, being for the payment of a debt and under the seal of the corporation, is *prima facie* valid and binding on the defendants; but it is, I think, competent for them to shew that, though executed with all the formalities deemed essential under that section, it was nevertheless given under circumstances which must relieve the defendants, as a corporation, of any liability at law upon it. When it is declared that all debts, bonds, obligations, and other instruments, to be executed in behalf of any corporation under that act, shall be valid if sealed with the seal of the corporation, and signed by the head of the corporation or other authorized person, it must not be supposed that an unlimited power is given to the several corporations of contracting debts in contravention of the other provisions of the statute. If all instruments under the corporate seal, and signed by the proper officer, were unimpeachable evidences of debt, but binding under all circumstances, the salutary provisions of the statute, which restrain all the municipal councils from contracting debts without providing the ways and means of paying them, would in fact be nugatory, and there would be nothing to prevent such bodies from running into heedless extravagance. The clause declaring evidences of debt made in a particular manner to be valid, must be taken to mean that such evidences of debt shall be valid if given for a debt which may be legally contracted. It is clearly the duty of municipal corporations, as soon as practicable, to make an estimate of the probable amount which may be necessary for all public objects within the year, and then to cause to be assessed and levied (under the 177th section) upon

the whole ratable property of their counties, &c., a sufficient sum of money to pay all debts incurred, with the interest which shall fall due or become payable within the year.

If, however, public works are to be constructed, the charge for which would be too heavy to be borne in any one year, such corporation may legally contract debts payable by instalments not extending over a period of more than twenty years; or they may negotiate loans of money for the same objects, payable in like manner within the same time. But no by-law for the creation of such debt, or negotiation for such loan, shall be valid and effectual to bind a corporation, unless a special rate per annum, in addition to all other rates whatever, shall be settled in such by-law, to be levied in each year, for the payment of the debt to be created or the loan to be negotiated. From the terms of the 177th section, I was at first inclined to think that it referred only to loans to be negotiated, and that a special rate was only necessary to be made for the security of loans. It declares that no by-law to be passed for the creation of any such debt, or for the negotiation of any loan shall be valid and effectual unless a special rate per annum shall be settled in such by-law (in addition to all other rates whatever), to be levied in each year, for the payment of the debt to be created by the loan to be negotiated; and I was strengthened in this opinion by finding that the 178th section declares that any by-law which shall attempt to repeal a by-law providing for the payment of a loan until such loan and interest shall be fully redeemed, shall be absolutely null and void, and makes neglect to enforce the original by-law for payment of a loan a misdemeanor—thus extending a protection to parties who may make loans of money under by-laws, but leaving parties who have debts due to them for other objects at the mercy of the several corporations. If such were the case, then it would seem to follow that municipal councils could only contract debts to be paid at distant periods by the negotiation of loans; but, by referring to the 14th section of the 13th and 14th Vic. ch. 64, amending ch. 81 of the former session of parliament, I find that the legislature have placed a differ-

ferent and more liberal construction on the 177th clause. It is enacted that no by-law passed or to be passed by any provisional municipal council in accordance with the requirements of the 177th section of the said first mentioned act (12 Vic. ch. 81) for imposing a special rate to be levied in each year for the payment of any debt created by loan or otherwise shall be repealed, &c. ; thus shewing that the legislature intended the provisions of that section to extend to debts created otherwise than by the negociation of loans. Then, in an act passed during the last session of parliament to enable municipal councils to contract debts with the crown without imposing a special rate, the sense of the legislature is again expressed as to the description of debts which municipal corporations are restricted from contracting without imposing a special rate, for their payment. In the last mentioned act I find a provision to this effect—"That all and every the provisions of the said act, or of any other act passed or to be passed, amending, varying or repealing the same or any part thereof, shall, except so far as they are inconsistent with the previous provisions of this act, apply and extend to every such by-law, and the moneys raised or to be raised thereby, as fully in every respect as such provisions would extend or apply to any by-law enacted by any such municipality or municipal corporation, for the creation of any debt or the negociation or raising of any loan, as provided in the 177th section, or to the moneys raised or to be raised thereby." This provision sets at rest any question as to the rights of municipal councils to contract debts for ordinary purposes, as well as by the negociation of loans under the 177th section to be secured in the same manner by imposing a special rate to be levied in each year for the payment of such debts. The pleas which have been demurred to allege that the instrument declared on was given for the payment of a debt incurred by the defendants as a municipal corporation after the passing of the act 12 Vic. ch. 81; and that a special rate was not settled in the by-law passed for the creation of such debt, to be levied for the payment of the debt as by the said statute is required.

Had it been necessary only to declare a special rate for the payment of debts contracted for loans of money, as, from the construction of the 177th section alone, I was inclined to think was the case, then the pleas would not contain a defence to the action, inasmuch as there is no allegation that the debt was for a loan of money; but as the 177th section, by the recognition of its provisions in other legislative enactments, must be taken to extend to other debts created by by-law as well as to loans of money; and as the creation of the debt in question is not denied to have been by a by-law passed by the defendants, if no special rate was settled in such by-law as alleged in the 5th and 7th pleas, the by-law is not valid or effectual to bind the defendants, and the debt created under it, as it appears to me, must fall with the by-law.

The instrument declared on bears date the 15th day of May, 1850, and is payable to the plaintiff on the 1st day of January, 1851. The town council was elected as required by law in January 1850, to continue in office under the 12th Vic. ch. 81 until the third Monday in January, 1851, so that the instrument was issued for an acknowledged debt payable within the year for which the council was in existence. When the debt became due on the 1st January, 1851, it was the duty of the municipal council then to have paid it; and the same council could, at any time before the third Monday in January, have imposed a rate for its payment as a debt falling due within their year. The 4th and 6th pleas allege that a special rate per annum, over and above and in addition to all other rates, was not settled in the by-law passed by the defendants for the creation of the debt, to be levied in each year, in payment of the debt so to be created as by the said statute is required. Now, for a debt falling due within the year, the statute does not require a special rate per annum, to be levied within each year, to be imposed. It may be quite true, as stated in these pleas, that a special rate per annum, payable or to be levied in each year was not settled by the by-law creating the debt; but it may also be true that the defendants under the first part of the 177th section, caused to be assessed and

levied upon the whole ratable property of the municipality a sufficient sum to pay this and all other debts incurred or falling due within the year. It appears to me, that when the statute requires a sufficient sum of money to be raised in each year to pay all debts incurred or to be incurred, or which shall fall due or become payable within the year, it must be taken to mean the year for which the municipal council is entitled to act, and not the period of time between the 31st day of December and the 1st day of January following. If this were not so, then, for the period between the first and the third Monday in January the municipal councils would be disabled from raising any sums of money by rates, however necessary it might be to meet expenses incurred by them during their year of office. I am strengthened in this view by finding in many cases where by-laws have been passed *ex post facto* to pay debts long previously incurred, the judges in quashing such by-laws, have expressed themselves strongly on the illegality and impropriety of corporations incurring debts and spending moneys, leaving to their successors the odium of providing the necessary means for their payment.

My opinion—and it is one which I have had some difficulty in arriving at—is, that the 4th and 6th pleas, in alleging that no special rate was imposed to be levied in each year for the payment of the debt in question, do not set forth a sufficient defence to this action; but that the 5th and 7th pleas, which allege that no special rate whatever was imposed in the by-law by which the debt was created, does shew a good cause why the by-law must be considered invalid, and the debt created by it not one which can be enforced against the defendants.

SULLIVAN, J., concurred.

Judgment for plaintiff on the demurrers, McLEAN, J., dissenting as to the 4th and 6th pleas.

McPHERSON V. PROUDFOOT.

A. being indebted to B., conveys to him lands in trust to sell, and, after paying his own debt, to pay over any surplus remaining to A. Whilst this trust remains open C., being also a creditor of A. for the amount of two promissory notes made by A. payable to him (C.), endorses these notes to B. with the assent of A., upon the agreement that B. should pay C. the amount of the notes out of any surplus of the proceeds of the lands which should remain in his hands after paying his own debt.

Held—That it not being proved that the account between A. and B. was ever finally adjusted, money had and received would not lie by C. against B. to recover the amount of the promissory notes.

When money is received in the execution of a trust, an action for money had and received cannot be maintained against the trustee, so long as such trust remains open.

B. having insured a mill erected on a portion of the lands conveyed in trust, and having received the insurance money therefor—*Quære*: Whether he was accountable to A. therefor. *Seem*—he was not.

Quære also—Whether in this case, even if there had been a final settlement of the account between A. and B., leaving a surplus in B's. hands, C. could have recovered against B. without declaring specially.

Process issued 26th March, 1851. Declaration dated 4th April, 1851. Assumpsit for money had and received and upon the account stated. Pleas—non assumpsit and payment.

The case was tried before the Chief Justice of the Court of Common Pleas, when the plaintiff, in support of his case, gave evidence to the following effect:

1st. A notice on the defendant, dated and served the 3rd of May, 1851, to produce the books of account, &c., in which was entered the account between the defendant and Peter McVean and Alexander McVean, and the notes obtained from the plaintiff by the defendant.

2nd. A notice on defendant dated and served 9th May, 1851, to produce all deeds, releases, and conveyances of certain lots in the Gore of Toronto, conveyed by Alexander McVean to defendant.

3rd. A notice on defendant, dated and served 16th May 1851, to produce the promissory notes made by McVean charged in defendant's account against Alexander McVean as amounting to 413*l.* 2*s.* 5*d.*, which were delivered by the plaintiff to the defendant.

4th. The notes were exhibited to a witness during the trial, but were not put in; nor were any deeds, conveyances or books of account produced.

5th. The plaintiff proved an account rendered by the

defendant to Alexander McVean, dated the 16th May, 1849.
The items on the debtor side were :—

| | 1839 | £ | s. | d. |
|---|------|-------|----|----|
| Feb. 14—To mortgage on lots 6 and 7 Gore of Toronto | 284 | 5 | 0 | |
| “ 10 years’ interest to May, 1849 | - | 170 | 10 | 10 |
| 1843 | | | | |
| Feb. —“ Amount advanced you on the equity of redemption being executed | - | 900 | 0 | 0 |
| “ 6 years’ interest on do. | - | 324 | 0 | 0 |
| 1844 | | | | |
| July 22—“ Paid Blake in Chancery suit against Woodill | - | 10 | 0 | 0 |
| “ Interest on do. | - | 2 | 18 | 0 |
| 1845 | | | | |
| Dec. 11—“ Paid Blake in Chancery suit against Woodhill | - | 61 | 18 | 6 |
| “ Interest to June, 1849 | - | 13 | 0 | 0 |
| 1849 | | | | |
| May 13—“ Your notes to McPherson, as acknowledged by your letter of this date | 418 | 2 | 5 | |
| “ 2 years’ interest | - | 50 | 3 | 4 |
| 1845 | | | | |
| May —“ Paid Gamble in sundry suits | - | 25 | 0 | 0 |
| “ 4 years’ interest | - | 6 | 0 | 0 |
| “ Paid Welsh for surveying | - | 4 | 0 | 0 |
| “ Interest, 3 years | - | 0 | 14 | 3 |
| 1849—“ Paid Maddock taxing costs, suit of Woodill | - | 2 | 10 | 0 |
| | | 10 | 0 | 0 |
| | | £2283 | 2 | 4 |

The items on the credit side were :—

| | 1844 | £ | s. | d. |
|--|------|-------|----|----|
| Jan. 7 — By land sold John Sleigh | - | 170 | 0 | 0 |
| “ Interest to May, 1849 | - | 54 | 16 | 6 |
| 1845 | | | | |
| March —“ Land sold Archibald McVean | - | 150 | 0 | 0 |
| “ Interest to 30th May, 1849 | - | 37 | 2 | 6 |
| Octo. —“ Land sold Robert Tindal | - | 450 | 0 | 0 |
| “ Interest to May, 1849 | - | 96 | 15 | 0 |
| Nov. 21—“ 50 acres of 6 in 8th con., sold to Watkins | 200 | 0 | 0 | |
| Interest to May, 1849 | - | 42 | 0 | 0 |
| 1846 | | | | |
| Jan’yry —“ Amount assumed by Woodill | - | 150 | 0 | 0 |
| “ Interest to May, 1849 | - | 30 | 7 | 6 |
| “ Balanced due to defendant 16th May, 1849 | 902 | 0 | 10 | |
| | | £2283 | 2 | 4 |

The plaintiff claimed the amount of the notes above mentioned under date 13th May, 1847, under the following circumstances :—

He produced oral proof that Alexander McVean, a very old man, and who was examined as a witness, had dealings with the defendant and became indebted to him, and assigned or conveyed property to him to secure him, being lots Nos. 5, 6, and 7, in 8th concession Gore of Toronto, estimated at 200 acres each, and to which the credits for lands sold related ; that during the progress of their transactions, the plaintiff held two promissory notes against the said McVean, which were by him transferred to the defendant with McVean's assent and at his request, on terms that the defendant should advance to the plaintiff 70*l.* at the time which he did, and promised to pay him the balance if there should be any surplus in his hands belonging to McVean after satisfying the defendant's demand against him ; that in consequence of this arrangement the notes were charged against McVean, as appears in the above account.

To establish the receipt of such surplus, the plaintiff proved orally the sale of certain portions of the land and the receipt of the purchase money thereon. It was said McVean owned lots 6 and 7 in fee, and had a government lease of No. 5, which was a clergy reserve ; and that a mill had been erected on the west half of the last mentioned lot, upon which mill the defendant had effected a policy of insurance in August, 1849 ; and afterwards it was burned, and the sum of £750*l.*, being the amount insured was paid to the defendant as follows :—

1850—16th May, 275*l.* ; 20th May, 100*l.* ; 29th May, 50*l.* ; 5th August, 300*l.* ; 8th Oct. 25*l.*

Of the lands credited in the above account, 50 acres were sold to Slocum, 100 acres to Archibald McVean, and 100 acres of lot No. 7 was sold to Tindal for 450*l.* ; and the other items were for portions of each lot of the residue. It appeared that Tindal had contracted to purchase 66 acres of No. 6 at 470*l.*, payable at 50*l.* next autumn (1851), and 100*l.* yearly afterwards till all is paid ; that 20 acres of No.

6 were given to or retained by Alexander McVean, and 10 acres were sold or retained by defendant as a water privilege; that defendant gave 25 acres of No. 5 to the widow of Peter, a son of Alexander McVean; and that 50 acres remain unsold. It was also admitted that another part of No. 5 had been sold to one Bland, who had paid the defendant therefor 300*l*. The average value of these lands was proved to be from 8*l*. to 12*l*. per acre. The quantities credited in the account are—Slocum, 50 acres; A. McVean, 100 acres; Tindal, 100 acres; Walker, 50 acres—making 300 acres: since sold to Bland, 100 acres, for which he paid 300*l*.; to Tindal, 66 acres; Alexander McVean, 20 acres; retained by defendant, 10 acres; to Mrs. P. McVean, 25 acres; undisposed of, 50 acres; making in all 571 acres, and leaving 29 unaccounted for. It was, however, stated by McVean's son in his evidence that all the land had been disposed of. It was said that Walker, among other tenants, had occupied the mill at the rent of 125*l*. per annum, but there was no proof of any payment of rent; there was evidence that the defendant and Peter McVean had dealings; but Alexander, his father, denied that he had anything to do with the mill, although he admitted that his said son had something to do with the first item in the defendant's account. On the other hand, a brother of Peter stated that the latter had done work about the mill, that the father was aided by his sons, and that they got money of defendant—how much he could not tell; and there was no other evidence, except what Peter had said the mill cost, which could not be received.

There was also evidence that in the winter before last the defendant had applied to Alexander McVean to execute releases of their lands, but no releases were produced, the object of such evidence being to prove a final settlement of the accounts between the defendant and McVean, and thereby to establish that McVean had satisfied or paid the defendant the full amount of plaintiff's notes in addition to all other demands. A witness was also called, who related what took place at an interview between the plaintiff and defendant about the 20th November last,

when the plaintiff demanded the balance of the promissory notes; in reply to which the defendant said he could do nothing; that it was a bad case for him; that the McVeans were still in his debt, and it was a losing transaction; that defendant said he did not expect to get the notes for 75*l.*; that if there was any more realised the plaintiff should get it, but that there was not the least probability of any more being realized. There was therefore no evidence of an account stated; and the only proof of moneys received on lands sold in addition to the sum credited in the account was, to Bland 300*l.*, and the insurance on the mill 750*l.*, making together 1050*l.* The former would not balance the items of debit in the defendant's account rendered earlier in point of time than the plaintiff's notes. The latter, if added, might do so, and leave a small surplus in reduction of that item. It was also contended, that on the evidence the defendant was liable to account for the price or value of all the lands as if received as he had disposed thereof according to his own discretion.

The plaintiff was however nonsuited, with leave to move to set it aside.

Connor, Q. C., obtained a rule in Easter Term calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had between the parties, on the grounds of misdirection and for the improper rejection of evidence. Cause was shewn during the following term by *Vankoughnet*, Q. C., and *Strong*, for defendant, who contended that the plaintiff relied upon proof of moneys received on land sales, and on the policy of insurance, without giving any secondary evidence of the nature of the defendant's interest in the lands or mill whatever. He was acting as a mere agent of Alexander McVean under a power of attorney irrevocable, as having an interest as trustee or mortgagee; and that, owing to uncertainty touching the extent of the defendant's claims, or the terms on which the defendant had a lien or claim upon, or an estate or interest in the property, it could not be determined that there was any surplus available to the plaintiff's benefit, or that the defendant had received any such surplus

so as to support the count for money had and received to his use: that the plaintiff should have sought a discovery, or called upon the defendant to account in Chancery, and had mistaken his proper course: that no presumptions could be raised upon the defendant not producing the deeds and books called for by the notices; and that the nature of the accounts regarding the defendant as a trustee required their adjustment in equity: that the case must be first considered as between defendant and McVean, as the plaintiff could have no action like the present unless McVane might, under the same facts and circumstances, have maintained it, had the plaintiff's claim not interposed; and that there is no such adjustment of the accounts between the defendant and McVean, that the latter would be entitled to sue for a balance as money received to his use: that in taking the account, the very first steps of enquiry must be the terms under which the defendant holds or was empowered to sell McVean's lands, and those terms do not appear with necessary distinctness: that there was moreover no consideration sufficient to bind the defendant to his alleged promise to the plaintiff; and if there was, it required to be in writing; but that the main point was, whether the evidence shews money received by defendant to the plaintiff's use—*Holt*, 500; *Edwards v. Bates*, 7 M. & G. 590; 13 L. J. C. P. 156; *Roper v. Holland*, 3 A. & E. 99; *Harvey v. Archbold*, 3 B. & C. 626; *Boddington v. Abernethy*, 5 B. & C. 793: that the defendant was not bound to account to McVean for the insurance money; and if he was, he could be made to account for it in a court of equity only—19 L. I. N. S. ch. 484; *Dobson v. Land*, 14 Ju. 288; *S. C. Peak*, 157; *Clarke v. Inhabitants of Blything*, 2 B. & C. 254 Stat. Geo. III. and upon the whole, that there was no clear evidence.

Connor, Q. C., in reply, submitted that two propositions were established: first, that the plaintiff may recover under circumstances like the present; and, second, that there was sufficient evidence to have gone to the jury to entitle him to do so. That it established—1st. That the defendant had property of McVean's. 2nd. That the plaintiff was

to be paid thereout. 3rd. That there was sufficient privity to sustain the present action. 4th. That there was proof sufficient of money having been realized. That all this was shewn by the account rendered in which a liability to account, for the proceeds of lands sold is transparently acknowledged on the credit side; and that there is no proof of any debt or demand against McVean otherwise than as appears on the debtor side: that subsequent sales were proved and even moneys sufficient actually received, including the insurance, to turn the balance and entitle the plaintiff to a portion of his demand at all events: that as the defendant withholds the deeds from McVean, to which plaintiff cannot have access, it may fairly be presumed that their terms do not conflict with his promises and obligations to the plaintiff as in evidence, and that the jury might presume after so great a lapse of time, that the defendant had disposed of and received payment for all the lands: that it is immaterial what right or interest defendant had in the lands as between him and McVean, as he had expressly promised the plaintiff in a good and valid consideration, not requiring proof in writing, that he would pay him if there was any surplus after satisfying his own demand: Wherefore, so far as plaintiff is concerned, McVean is entitled to implicit credit against the balance of the defendant's account rendered for the proceeds of lands sold or otherwise disposed of.

MACAULAY, C. J.—I still entertain the impression that admitting that the plaintiff being in a position to recover as for money had and received without declaring specially (see *Wharton v. Walker*, 4 B. & C. 166, *Littledale, J.*; and *Platts v. Lean, Executor*, 3 C. & P. 561), on the grounds that, although defendant's promise to him was at first conditional, yet the event having happened, or the condition ceasing, it became absolute.—See *Wilson v. Copeland*, 5 B. & A. 231, *Abbott C. J.*; and *ib.* 232. *Best, J.*) He was not entitled to recover on the evidence, because the event on which his right to be paid depended was not sufficiently proved. At the same time, I much doubt whether he ought not at all events to have declared specially.

This is an action for money had and received to the plaintiff's use ; and the difficulties in his way are to shew that any moneys received by defendant were his or received to his use, or that a clear surplus remained in defendant's hands after satisfying all his demands against Alexander McVean applicable to the satisfaction of the plaintiff's demand. In the first place, in the absence of any specific proof of the nature or contents of the deeds executed by McVean to the defendant, it must, I think, recurring to the terms of the defendant's account rendered and McVean's evidence—be intended that the defendants held the lands absolutely at law, though probably only as mortgagee or trustee of McVean in equity. The account speaks of the mortgage on lots 6 and 7, and of the equity of redemption being executed ; and the plaintiff's notices to produce call for deeds, releases, and conveyances of certain lots in the Gore of Toronto, conveyed by Alexander McVean to defendant. I do not think defendant could be looked upon as a mere agent of McVean employed to sell his lands, the title and estate remaining in him ; but that the estate had been conveyed to defendant, who was either a mortgagee or trustee of McVean, and liable as such to account. If it was necessary to determine which, I should say the intention ought to be that he was mortgagee, under conveyances of the absolute estate at law and that he holds the same as a security only in equity ; that, standing in this relation to McVean who was indebted to the plaintiff on the notes, which were in some way transferred to the defendant or as expressed in the plaintiff's notice to produce—that he obtained them from the plaintiff with McVean's assent and at his desire and charged the amount against him in account—not merely the 70*l.* which he had advanced to plaintiff.

Now, whether the defendants received these notes as endorsee of the plaintiff, or as mere bailee, agent, or trustee of the plaintiff, I do not see that the plaintiff discharged McVean, or that he ceased to be indebted and liable accordingly to the plaintiff, although he might have become liable to the defendant as endorser or holder. It was

apparently the case of a transfer by the payee of two overdue promissory notes to the defendant, who charged them against the maker in account—the maker consenting that they should be allowed to enhance the defendant's demand against him, to be secured by, or paid or retained out of the proceeds of the lands in question. If so, McVean was indebted to the defendant as indorsee of the notes, without being discharged from contingent liability to the plaintiff, if returned to him by defendant, as they might be. Concurrently with this, the defendant incurred the obligation to pay plaintiff the amount if he received a surplus upon the sale of McVean's lands, and promised accordingly. Then where is the proof of such surplus? To shew that, I may adopt the language of Abbott, C.J., in *Harvey v. Archbold*, 3 B. & C. 630, and say, "Surely they should have given some further evidence of the state of the account:" On the evidence, as it was, I was not satisfied that the defendant had no claims against the lands, especially lot No. 5, except the balance of the account rendered to Alexander McVean; on the contrary, I thought at trial, and still think, that there is room to call for something more distinct respecting the transactions in relation to that lot, and the account in respect of the mill, &c., between the defendant and Peter McVean, as well as between the defendant and Alexander McVean. It seems the defendant acquired an interest in the mill on some terms and for some considerations and purposes, and yet there is no allusion thereto in the account rendered. Of this lot (a clergy reserve, it was said), 100 acres had been sold to Bland and 25 given to Peter McVean's widow, indicating a claim on her part on her husband's account. Of the residue of the lot no distinct account was given, nor was it shewn that any part of the proceeds thereof were credited in the defendant's account rendered. How far, therefore, the defendant acknowledged Alexander McVean's account thereof remained a question; but, beyond this, even allowing Alexander McVean full credit for all moneys received on lands sold, including the 300*l.* paid by Bland on No. 5, there was no surplus at all shewn, unless credit was also given for the insurance

money on the mill; for I do not consider land still held by the defendant unsold, or lands contracted for but not yet paid for, or land reconveyed back to Alexander McVean or given to Peter McVean's widow as alleged, money had and received either to McVean's use or to defendant's use.

It occurred to me that the account must first be regarded between defendant and McVean, who was indebted to defendant; and the question asked, whether, as between them, a surplus was shewn, for which, irrespective of the charge for the plaintiff's note, he could have supported an action for money had and received.

I did not think, nor do I at present think, that, on the evidence, Alexander McVean was entitled to credit for the insurance money, or to anything in the shape of money received that would shew a clear balance in his favor, held by the defendant as money to his use, consequently not so held to plaintiff's use. The cases are numerous and not all consistent, as to what should be considered sufficient evidence of money being received by a defendant to the plaintiff's use. Under some circumstance it is no doubt clear enough; but when, as here, third parties intervene, and the relation of mortgagor and mortgagee, or trustee and *cestui que* trust, exist, difficulties arise.

It is by no means clear that, as between the original parties—that is, Alexander McVean and defendant—a surplus could be recovered at law at all, as received to his use, in the absence of any proof or admission of a clear balance or adjustment of the accounts; and, even if there was, it would not follow that it was held to plaintiff's use. The moneys recovered were either defendant's own or McVean's at the time of their receipt; McVean owed defendant the amount of the notes, and was entitled to credit for the proceeds of his lands against them; so that all moneys received until the amount of the notes were paid were McVean's moneys, received for him and applicable to his use to pay off the notes, and not to the plaintiff's use. It is however contended, that as far as defendant received money of McVean's in liquidation of the notes, such money belonged to the plaintiff, whom defendant had promised

to pay thereout, and was held to his use as between the defendant and him. I am not prepared to say this would not, in case an admitted or clear balance were shewn; but whatever the rights of the parties may be in equity, either in relation to the insurance money, the proceeds of lands sold, the value of lands otherwise disposed of—in short, to an account. I do not think that it is shewn at law that McVean is entitled to demand the insurance money as received to his use (9 East. 72; 1 Mod. 573; 2 Rose, 410; 19 L. J. Ch. 484; 3 Anst. 687), or that the plaintiff can indirectly call upon the defendant to account, as if in a court of equity, in order to establish a surplus, and then claim it as money received to his use. I think the account must be first adjusted; or, if not, that a clear surplus or balance proved of money received by defendant, which *ex æquo et bono* belongs to the plaintiff, to entitle him to recover. That, I do not think was clear within the spirit and meaning of the cases on the subject, and cited on the argument. Carr v. Roberts (Holt. 500) has been recognized in subsequent cases, and quite recently, as correctly laying down the rule. There, it is said, “If money is paid into the hands of a trustee (or by parity, received by a mortgagee) for a specific purpose, it cannot be recovered in an action for money had and received until that specific purpose is shewn to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of a discovery. If the plaintiff shews that a specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such a balance (the trust being closed) becomes a clear and liquidating sum, for which an action will lie at law. Whilst the matter remains in account and is charged with the specific trust, the action for money had and received will not lie, although it will lie to recover the balance of a banker’s account, however voluminous.—1 Mar. 115.

In Carr v. Roberts, the defendant had received a specific sum of money for the plaintiff for a special purpose, and the difficulty arose out of the defendant’s claim set up

against the fund. The principle of that case is applicable to the present one. *Edwards v. Bates et al.* (7 M & G. 590) is also much in point. It was debt for money had and received; and Tindal, C. J., stated the ground and principle for money had and received—namely, that the defendant had received money which *ex æquo et bono* belonged to the plaintiff; and said that he was not aware that the action had never been allowed; except in cases where a known specific sum had been received by the defendant to which the plaintiff was entitled—as, where such money had been received without consideration, or the consideration had failed, when the moneys would be held in justice and in equity to the use of the plaintiff; but that in that case, after the money had come into the hands of the defendants, something remained to be done under the contract before any portion of it was to go over to the plaintiff. He then recited the three specific trusts on which the money was received; the third being that the surplus, if any, was to be paid over to the plaintiff, and under which alone he was entitled; and, after remarking upon the second trust not being adjusted or closed, he added, “the plaintiff ought to have filed a bill in equity for an account.” He referred to *Roper v. Holland* (3 A. & E. 99, and 4 N. & M. 668) as in point, and also *Carr v. Roberts* (Holt. 500). Again, after referring to *Weston v. Downes* (1 Doug. 25) and *Ponce v. Wells* (Cow. 818), he put it upon the footing of a special contract not rescinded, but still remaining open. In that case there was no dispute about the amount received; the difficulty arose out of its application and the form of action. Cresswell, J., advert-
ing to another point—namely, that the plaintiff should have sued in covenant, and referring thereto—said it was palpably an open trust, under which something remained to be done by defendant: “suppose,” he said, “the plaintiff had brought his action on the covenant (3 M. & G. 12), he must have sued for the surplus, after shewing that the trust had been performed. He was not in a situation to shew that fact in this case; and perhaps they may have been the reason why the present form of action was

adopted: there, the terms of the trust were shewn by the deed—here, all is left in uncertainty. In *Roper v. Holland*, cited above, the defendant was held to have admitted a specific sum in hand for the plaintiff.

Bartlett v. Diamond et al. (14 M. & W. 40).—Assumpsit for money had and received; see the facts stated at page 50, and shewing the trusts. Parke, B., said—the plaintiff, in order to recover, must shew that there was a positive surplus; that was the main question. Again, the difficulty was to see what portion of the money was received to plaintiff's use at that time; although there might be some ultimate balance coming to him, it seems to rest rather in contract than in property. Pollock, C. B.—So long as a trust continues, a bill in equity is the only remedy. We think the moneys received were originally received in trust, and that the trust had not determined at the testator's death. If that trust were ended, and the trustee had stated an account—or, in other words, had himself admitted to the plaintiff that he held any sum of money in his hands payable to him absolutely—he would, with respect to that sum, be a debtor, not properly a trustee, then an action would have been maintainable against him. This is the principle upon which *Roper v. Holland*, and the other cases referred to by the Court of Exchequer in *Pardoe v. Price* (13 M. & W. 282) were decided. The case of *Allen v. Jupett* (8 Taunt. 263) seems at least questionable.

If McVean himself were plaintiff, the foregoing cases would operate against his right to recover on the evidence adduced; and they operate with more force against the plaintiff's right, as to whom it vests rather in contract than in property.

The action is not founded on a special contract to pay on a certain event, &c., but it is founded on property, or a right to the money recovered as belonging to plaintiff and received or held to his use. Such right, the evidence, I think, failed to establish; and the cases mentioned only confirm me in the view I felt bound to adopt at *Nisi Prius*.

As to the insurance money—it is evidently a nice and unsettled point; and, without seeing the deeds or title

under which the defendant holds the property, is not capable of being decided. If the defendant had an insurable interest, the policy was granted in respect thereof, not in respect of McVean's interest; and I do not see on what legal principle it was his money and recovered to his use.

He is not liable to pay, nor is he charged with the premiums; and whatever claim he may have in the premises must, I think, be adjusted in equity, although the case in 9 East. 72 treats it as a question of law; but it was not a case strictly between mortgagor and mortgagee. If the defendant had no interest, and yet insured the mill, which insurance the insurers paid without objection, *a fortiori* McVean could have no legal right thereto, by reason of any privity existing between him and defendant in relation thereto. If McVean is not entitled to the proceeds of the policy as received to his use, the plaintiff cannot be so entitled; and if McVean is so entitled, it shews the money to have been received to his use, and not the plaintiff's; unless, indeed, the defendant having become the holder of the notes, and made the engagement he did with the plaintiff with McVean's assent, alters the case, and renders any surplus found to remain after satisfaction of defendant's demand against McVean received and held *ab initio* for the use of, and therefore had and received for, as belonging to, the plaintiff. I have reflected on this view of the case, but cannot bring myself to regard any of the moneys as received to plaintiff's use, without more evidence than was shewn at the trial. It wanted something more to convert money received and held under the trusts or mortgages from McVean into money held for and belonging to the plaintiff. With respect, further, to the necessity for the plaintiff to declare specially, I think that it is in effect the case of the defendant buying and taking the notes as endorsee of the plaintiff, paying part down and promising to pay the residue whenever (if ever) the maker (McVean) paid him. It was a sale of the notes by plaintiff, on condition or a conditional purchase by the defendant; and the remedy is a covenant for notes sold and assigned, or a special assumpsit, if the consideration has ceased and the

promise therefore absolute, and not for money had and received by defendant for the use of the plaintiff.

SULLIVAN, J.—I cannot see that the evidence on the part of the plaintiff permits us to come to any other conclusion than this: That the defendant bought from the plaintiff, and the plaintiff assigned to the defendant, two promissory notes amounting to 418*l.* 2*s.* 5*d.* with interest, which notes were made by Alexander McVean, and were payable to the plaintiff or order, the consideration of the assignment being a payment of 75*l.* in hand; and, so far as we can judge from the obscure and unsatisfactory evidence which it was in the plaintiff's power to adduce, the remaining consideration being an undertaking by the defendant to pay the balance of principal and interest so soon as he should receive or realize a sufficient amount from the sale or disposal of certain lands of McVean, which the defendant was in the course of disposing of as trustee or agent of McVean. The account between the defendant and McVean rendered to the latter by the defendant, in which the whole amount of the notes and interest are charged against McVean, and not merely the sum of 75*l.*, shews the defendant the proprietor and holder of the notes. All the parol testimony is consistent with this view of the case; and although it is possible and even reasonable to suppose the defendant only to have been an agent of the plaintiff, as we cannot see his personal advantage in the transaction, yet there is no evidence to submit to a jury upon which such a conclusion could be founded.

If the defendant had received the promissory notes from the plaintiff for collection as the plaintiff's agent, paying him the sum of 75*l.* out of funds in his hands as trustee for McVean, and undertaking to pay the balance so soon as other funds, arising from the same source, should come into his hands over and above the debt due to the defendant himself, then this action would have been well conceived; and, in addition to proof of the deposit of the notes upon these terms, it would only have been necessary for the plaintiff to have shewn a receipt of money by the defendant in excess of the amount of defendant's claim on

McVean; which money would, I think, have been received to the use of the plaintiff, particularly as the note transaction, whatever it was, between the plaintiff and defendant, was with the assent and approbation of the *cestui que trust* McVean. But if, as the evidence leads us to conclude, defendant was the purchaser of the notes, and therefore the creditor of McVean to their whole amount, and debtor to the plaintiff for the balance over and above the ready money payment of 75*l.*, the balance being payable upon a contingency—namely, the receipt of money from the trust fund—then I do not see how the receipt of that money would have been to the plaintiff's use, or anything but a receipt of the defendant's own money, and the occurrence of a naked event, upon which the balance of the notes would under the agreement between the defendant and the plaintiff, become payable.

The only count in the declaration upon which the plaintiff can pretend to recover is, that for money had and received by the defendant to his the plaintiff's use; and, taking the evidence in the light most favourable to the plaintiff's claim, I see no legal grounds upon which the action could have been sustained in its present form, or on which the nonsuit granted in this case can be set aside for misdirection.

McLEAN, J., concurred.

Rule discharged.

IN RE HAWKINS V. THE MUNICIPAL COUNCIL OF THE UNITED COUNTIES OF HURON, PERTH, AND BRUCE.

A by-law of a municipal council is valid if it appears on the face of it to be enacted and passed by a municipal body having authority to make such by-law under the statute 12 Vic. ch. 81.

A variance in stating the legal name of such municipal corporation in a by-law will not invalidate such by-law, if it appears on the face of it to be enacted and passed by a corporation having authority to pass it.

Municipal corporations, under 12 Vic. ch. 81, may by a subsequent by-law impose an additional rate to provide for any deficiency in the sum levied under a previous by-law for payment of debts incurred previous to the first of January, 1849.

This is a rule calling on the municipal council to shew cause why the by-law passed in the January and February sessions of such council in 1850, entitled "a by-law to authorize the levying of one half-penny per pound upon all

lands liable to assessment, and one half-penny per pound upon all other ratable property liable to be taxed within the united counties of Huron, Perth, and Bruce," should not be quashed, on the grounds:—

1st. That it does not distinguish what part of the 4,850*l.* 10*s.* 5½*d.* therein mentioned was a debt *bona fide* due before the 1st of January, 1849, and what part a liability becoming due thereafter.

2nd. That it is bad and void for uncertainty, and does not sufficiently shew in the enacting part whether the sum of one half-penny in the pound therein mentioned to be raised and levied is to be rated upon lands alone, or upon lands and other ratable property; and if to be rated upon lands alone, that it is illegal, as the council cannot direct any rate to be levied solely on one particular class of ratable property.

3rd. That it does not enact that a specified sum shall be raised, and then declare a rate for paying the same, as it ought to have done, but assumes to impose a tax of one half-penny in the pound, which the council had no right to do, and which may prove permanent.

4th. That it does not appoint any definite period of time for which it shall continue in force, or shew that the sum of one half-penny per pound will at any time suffice to satisfy the said debt of 4,850*l.* 10*s.* 5½*d.*

5th. That it provides no definite period at which, or instalments by which the said debt of 4,850*l.* 10*s.* 5½*d.* shall be paid, and that no default can be shewn thereunder.

6th. That it does not appear whether the said sum of 4,850*l.* 10*s.* 5½*d.*, or what part thereof, was *bona fide* due before the 1st January, 1849—it not being competent for the said council to pass any such by-law for the payment of any liability to become *bona fide* due after the said first of January.

7th. That it is not enacted by or in the legal name of the council, and it is therefore ineffective. The name used is "The Warden and County Council of the said United Counties of Huron, Perth, and Bruce, in council assembled, by virtue of the powers vested in them by 12 Vic. ch. 81."

8th. That it was not competent to the said council, by one by-law, to direct any special rate to be levied in future years for the payment of a debt due before the 1st January, 1849.

9th. That it enacts that the said rate of one half-penny in the pound shall be levied in the first instance upon lands and other ratable property—which is illegal.

10th. On grounds disclosed in affidavits and papers filed.

The by-law in question is entitled as above, and after reciting that it appeared by the general statement of liabilities and debts laid before the said council that the late municipal council of the district of Huron was, prior to the first day of January, 1849, in debt to a large amount—that is to say, to the amount of 4,850*l.* 10*s.* 5¼*d.*, with interest—and that it was necessary and expedient that the sum of 5,850*l.* 10*s.* 5¼*d.*, should be raised, levied, and collected, to meet the demand on the said late district of Huron, enacted :

1st. By the warden and county council of the said united counties of Huron, Perth, and Bruce, in council assembled, by virtue of the powers vested in them by the act of 12 Victoria, ch. 81, that the sum of one half-penny per pound upon all lands liable to assessment within the said united counties be levied and raised on such lands and other ratable property, for the purpose of paying off the said sum of 4,850*l.* 10*s.* 5¼*d.* with interest.

2nd. That this by-law should be and remain in force until the whole of the above debt of 4,850*l.* 10*s.* 5¼*d.* and interest thereon, and to accrue thereon, should be fully discharged and satisfied, or until the same might be altered or repealed by any act or acts of the legislature of the province.

3rd. That for the purpose of fully carrying out the intention of that by-law, the collector in each township, after receiving a certified copy of the assessment roll, should and might demand from every person whose name appeared upon the same the sum rated or charged against such person ; and if, after the space of fourteen days from the time of such demand, the party refused or neglected to pay the said sum so rated or charged against him as aforesaid, the

collector, upon oath of having made such demand, taken before any magistrate within the said united counties, should be entitled to demand a warrant to levy the same upon the goods and chattels of the person so refusing; and upon receipt thereof, the said collector, or any constable within the said counties, should further levy the same by distress and sale from the goods and chattels of the person so refusing, rendering the overplus, if any, after deducting the rates and charges and expenses of distress and sale, unto the owner of the said goods.

4th. That in case any person or persons who should be liable to pay the said rates aforesaid removed from the said township in which he had been assessed for the said rates, and resided in another township within the said united counties, it should be lawful for the collector or constable to procure a magistrate's warrant to follow such person or persons into any other township in the said united counties, and levy the amount by distress and sale as aforesaid, provided the person or persons refused to pay the same upon demand being first made as aforesaid.

At the same time another rule was granted, calling on the said municipal council to shew cause why the by-law framed at the special session of the said council, convened by the warden and held at the Huron Hotel, Goderich, on Tuesday, the 6th April 1850, entitled "A by-law to authorize the levying of $1\frac{1}{2}d.$ per pound upon all lands liable to assessment, and $1\frac{1}{2}d.$ per pound upon all other ratable property liable to be taxed in the united counties of Huron, Perth, and Bruce," should not be quashed, on the grounds:

1st. That it appeared to be a second by-law passed by the said council for the purpose of liquidating debts of the said united counties due before the 1st of January, 1849, which debts had been the subject of a previous by-law and provision once before made for the liquidation thereof.

2nd. That it does not distinctly state the former provision therein referred to was insufficient for such purpose, but merely inferentially that the warden of the said council, finding it so, convened a meeting of the council for the

consideration of financial difficulties of the said counties, and as to the debts *bona fide* due before the said period, or the balance thereof unsatisfied.

3rd. That it is not enacted by or in the legal name of the said municipal corporation, and is therefore ineffective (ante No 7). The name used is "by the wardens and county council of the said united counties of Huron, Perth, and Bruce, in special council assembled, by virtue of the power vested in them by the act of 12 Vic. ch. 81.

4th. That it does not limit or fix any precise sum to be raised and levied by the authority thereof, but imposes a tax of $1\frac{1}{2}d.$ in the pound on lands and other ratable property within the said counties, which was illegal and beyond the power of the said council.

5th. That it does not declare in what portion of the 4,850*l.* 10*s.* $5\frac{1}{4}d.$ therein mentioned remained unsatisfied at the date thereof, nor does it state how much thereof was *bona fide* due before the said 1st January, 1849, or fix any time for the payment thereof either in whole or by instalments, or the duration of the said by-law itself, but creates a tax which, for all that appears by the said by-law, continues for an indefinite period, upon property within the said counties, and contemplates the payment of future as well as past debts.

6th. That it is illegal and beyond the powers of the said council, in seeking to impose a special rate, to extend to future years for the payment of debts due before the 1st of January, 1849, and also for the payment of future debts.

7th. That it seeks to impose a sum beyond the jurisdiction of the said council, and

8th. On grounds disclosed in affidavits and papers filed.

This last mentioned by-law, as above stated, after reciting that at the sittings of the municipal council of the united counties of Huron, Perth, and Bruce, held in the town of Goderich on the 28th January, 1850, a by-law was passed authorizing the levying and raising one half-penny per pound upon all lands liable to assessment within the said united counties, and one half-penny per pound upon all other property liable to be taxed within the said counties,

for the purpose of paying off the amount of debt due by the late district of Huron, prior to the 1st January, 1849—that is to say, the sum of 4,850*l.* 10*s.* 5¼*d.*

And that the warden of the said united counties, finding that the provision so made as aforesaid was totally insufficient to meet the liabilities of the said united counties, convened a special meeting of the said municipal council, to be holden at Goderich on Tuesday, the 16th of April, 1850, to take into consideration the principal difficulties of the said united counties, and to make further provision for paying the debts of the same; and that such special meeting did, on the 16th of April, 1850, meet at the Huron Hotel, Goderich, and passed a resolution to the effect that an additional sum of 1½*d.* per pound upon all lands liable to be taxed within the said united counties, and 1½*d.* per pound upon all other ratable property within the same, be raised, levied, and collected within the same, in addition to the rates imposed under the by-law passed on the 28th January last past, for the purpose of reducing the debts due by the said counties prior to the 1st January, 1849, enacted by, &c.

1st. That the sum of 1½*d.* per pound upon all lands liable to assessment within the said united counties, and 1½*d.* per pound upon all other ratable property within the said united counties, be raised, levied, and collected within the said counties for the purpose of reducing the debts due by the said counties prior to the 1st of January, 1849, and interest on the same, in addition to the sum of one half-penny per pound upon all lands liable to assessment and one half-penny per pound upon all other property liable to be taxed within the said counties and already imposed by a by-law passed at the late meeting of the said council in January last passed.

2nd. That this by-law should be and remain full force until the whole of the debts of the said united counties, and interest thereon and to accrue thereon, should be fully discharged and satisfied, or until the same might be altered or repealed by any act or acts of the legislature of the province.

3rd. That all arrears of taxes then due to the said united counties be appropriated towards liquidating the said debt of the said united counties as soon as the said arrears of taxes are paid.

4th. That, &c., similar to No. 3 of the first by-law, except that the word "forthwith" is substituted for the word "further".

5th. Similar to the first by-law (a).

Cause was shewn by *Cameron*, Q. C., and *Strachan*, who contended:

1st. That the recitals to the by-laws sufficiently state the debts and amount thereof, and that the by-laws are valid under 12 Vic. ch. 81, sec. 182, which speaks only of debts existing on the 1st January, 1849, and not debts thereafter incurred.—*Conger v. County Council of Peterboro'*, (U. C. Q. B. R.)

2nd. That an omission in transcribing the by-law has manifestly occurred, as seen by comparing the language of it with the title and with the second by-law, which is accurately worded; but that it is sufficiently certain that it imposes the rate upon all property liable to assessment, and that it should be so construed.

3rd. That it must be intended to be a by-law under the provision of section 182, and to be construed favorably according to the intent; that it is incumbent on the relator to show that it is invalid, whether on the face of it or by proof of extraneous facts; that it is, at all events, a good rate once, or for one year, whether the amount be sufficient or insufficient not appearing on the face of it, or even proved *aliunde*, and that it is repealed after the year 1850 by the 13 & 14 Vic. ch. 66, sec. 1, if not in toto, the saving clause in the last act only relating to by-laws passed exclusively for that year.

4th. That the 4th objection is immaterial since the repeal of the by-law, and so of the other objections. That if good in part, the rule cannot be granted to set it aside in toto, and that if good for one year and void for uncertainty as to future years, it would not be illegal, in which event only the Court can quash it. As to the objection of misnomer he treated it as untenable.

McDonald, in reply, contended:— that the by-laws were

(a) These by-laws are worded in the present, though recited in the past tense.

not repealed in toto: that they affect lands in the united counties of Huron, Perth, and Bruce for the year 1850 at all events, and if illegal in that respect may be quashed: that under them the lands of Mr. Hawkins might be sold, and that the first was clearly bad for uncertainty and for not applying the rate to all other ratable property as well as land: that the misnomer had not been answered, and was alone a fatal objection to both by-laws, referring to the various clauses of 12 Vic. ch. 81, prescribing the names of the different municipal bodies thereby created, and which ought to be strictly adhered to.—Attorney General v. Mayor and Burgesses of Worcester (2 Phillip, 3), Rochester v. Lee (15 Simmons, 376): that sec. 185 speaks of by-laws lawfully made by any municipal corporation under that act, but no such name as the warden and county council is anywhere used: that the by-laws are not under sec. 182, for if they were, they should recite the debts to be *bona fide* due, whereas, for all that appears, the debt in question may not be due or payable for years to come: that the objection to the first by-law is valid—that it does not include all ratable property, but only one half-penny in the pound upon lands to be levied and raised out of such lands and other ratable property, whereas it ought to have been a named sum, or so much in the pound upon all ratable property within the locality: that it is not a law for levying a rate, but imposing a tax, and requires the utmost certainty, referring to secs. 176, 177, and 59 Geo. III. ch. 7, sec. 7; 7 B. & C. 722; Rex v Justices of Glamorganshire (15 Jurist, 196): that several by-laws or rates cannot be made in the same year on the same subject, and that sec. 182 contemplates only one, and that the interpretation clause, section 210, only applies where one or more the singular or plural might be equally adopted, and that here it would be repugnant to, or inconsistent with the context.

MACAULAY, C. J.—The statutes more immediately applicable are:—

12 Vic. ch. 81, secs. 32 & 33—incorporating counties by the name of the municipal council of such counties.

12 Vic. ch. 96—relative to the united counties of Huron, Perth, and Bruce.

12 Vic. ch. 81, sec. 41—empowering the municipal council of each county to make a by-law or by-laws for each or any of the purposes therein mentioned, and among others, by No. 22, for raising levying, collecting, and appropriating such moneys as may be required for all or any of the purposes aforesaid, either by way of tools, &c., or by means of a rate or rates to be assessed equally on the whole ratable property of such county liable to assessment, according to any law which shall be in force in Upper Canada concerning rates of assessments—See 13 & 14 Vic. ch. 67, sec. 931, and No. 23, for repealing, altering or amending by-laws, &c.; also sec. 120, that in future the collectors' rolls shall contain the amount of the assessed value of the real, and also the amount of the assessed value of the personal property of each person whose name shall appear on such roll, as well as the amount to be collected from such person.

Sec. 175—All debts, liabilities, and obligations of former corporations, of what kind soever or in what manner soever secured, shall become debts, liabilities, and obligations of such new corporation, secured and payable in like manner and upon the same terms and conditions, to be reserved and enforced if not paid or performed in the same manner as they would have been recovered from, or might have been enforced against such former corporation, or otherwise as by this act provided.

Sec. 176—That it shall be the duty of every such municipal corporation to take charge of any debts which may be due by the locality over which it has jurisdiction, and to direct the levy by tax upon the same of such sum in each year as shall be necessary for the payment of the interest thereon, and as shall be sufficient to pay off the principal according to the contracts and obligations which shall have been entered into in that behalf.

Sec. 177—That it shall be the duty of such municipal corporations, respectively, to cause to be assessed and levied upon the whole ratable property in their counties, &c., a sufficient sum of money in each year to pay all debts incurred or which shall be incurred, with the interest which shall fall due or become payable within the year, &c.

Sec. 179 provides for enforcing execution against municipal corporations.

Sec. 182—That with respect to any debt *bona fide* due by any district municipal council, &c., prior to the 1st of January, 1849, it shall and may be lawful for the municipal corporation by this act substituted therefor, at any time within a year from the commencement of this act (1st January, 1850), to pass a by-law providing for the liquidation of such debt, and upon such by-law being approved by the governor and council, the provisions of sec. 179 shall not apply to such debt until default in raising or applying the necessary funds, &c.

Sec. 155—That any resident, &c., or for any other person having an interest in the provisions of any by-law, &c., to obtain a certified copy thereof under the hand of the county clerk, and the seal of the municipal corporation of which he is the officer, and the Court of Queen's Bench or Common Pleas may be moved, &c., to quash such by-law; and if it shall appear to the said court that such by-law is in the whole or in part illegal, it shall be lawful, upon the return of the rule to shew cause as therein provided, to order such by-law to be quashed in the whole or in part; and if it shall appear to the said court that such by-law is legal in the whole or in the part complained of, to award costs in favor of the corporation, or otherwise against such corporation.

Sec. 210—To be construed liberally to affect its true intent, meaning and spirit.

13 & 14 Vic. ch. 66, sec. 1, at the end—repealed all by-law, rules, and regulations of county municipal councils, &c., imposing rates or assessments, or providing for the collection thereof, except in so far as the same might effect any rates or taxes for the then present year (1850), or any rates or taxes which had accrued and were actually due, &c.

Ib. ch. 64, sec. 14—That no by-law passed by any municipal council, &c., in accordance with the requirements of the 177th section of 12 Vic. ch. 81, for imposing a special rate to be levied in each year for the payment of any debt created by loan or otherwise, shall be repealed by the 13th & 14th Vic. ch. 66; but notwithstanding anything in that

act contained, every such by-law shall remain in force until the debt to which it relates and the interest thereon shall be fully paid and discharged.

The two by-laws may be considered together in relation to the principal objections :

1st. The first in order is the seventh objection to the first, and the third objection to the last by-law, being the alleged misnomer in the name used by the municipal council in making the by-laws in question.

2nd. The first and sixth objections to the first by-law are substantially the same—namely, that it does not appear whether the whole of the said sum of 4,850*l.* 10*s.* 5¼*d.* was *bona fide* due before the 1st of January, 1849 ; nor if only a part thereof, what part was so due, as distinguished from the portion becoming due thereafter.

The fifth objection to the second by-law is similar—namely, that it does not declare what portion of the said debt remained unsatisfied at the date thereof, nor state how much thereof was *bona fide* due before the 1st January, 1849.

The third objection to the first, and the fourth objection to the second by-law are similar—namely, that they do not enact, limit or fix any specific or precise sum to be raised and levied, and then declare a rate for paying the same, but assume to impose a tax of ½*d.* and 1½*d.* in the pound respectively, which the council had no power to do.

4th. The fourth and fifth objections to the first by-law, and the latter part of the fifth objection to the second are alike—namely, that neither appoints any definite period at which, or instalments by which the said debt shall be paid, nor for which they shall continue in force, or shew that the sum to be levied will at any time suffice to satisfy the said debt, but that they create taxes which (for all that appears) may continue for an indefinite period, and contemplate the payment of future as well as past debts.

5th. The eighth objection to the first, and the sixth to the second by-laws, are—that it was not within the power of the council thereby to direct special rates to be levied in future years, for the payment of a debt due before the 1st of January, 1849.

6th. The ninth and tenth objections to the first, and the seventh and eighth to the second by-law, are general—that the rates are illegal, beyond the jurisdiction of the council, and that they are invalid upon the grounds disclosed in the affidavits filed.

7th. The second objection to the first by-law is peculiar to that one, and the first and second objections to the second by-law apply exclusively thereto.

The names of the county councils are prescribed by the statute 12 Vic. ch. 81, sec. 32, which enacts that the powers of such corporations shall be exercised by and through and in the name of the municipal council of such county; the name used is “the warden and county council of the united counties of Huron, Perth, and Bruce, in council assembled”—that is, the by-laws are stated to be made by them. The former act of 4 & 5 Vic. ch. 10, sec. 1, enacted that the powers of the corporations thereby created should be exercised by and through the name of the council of the district. The statute 9 Vic. ch. 40, sec 7, speaks of them as district or municipal councils, and in sec. 8 as municipal or district councils. The statute 12 Vic. ch. 81, sec. 33, declares who shall constitute the municipal council of each county, and sec. 34 provides for the election of one of their number as warden, who shall preside and be head of the corporation. Sec. 41 empowers the municipal council to make by-laws; and by sec. 168, in cases of equality of votes of the others, exclusive of the person presiding, he shall have a casting vote; and all by-laws are, by sec. 198, to be authenticated by the seal of the corporation, or the signature of the head thereof, or of the person who presided at the passing thereof. The by-laws in question appear to have been thus authenticated.

The cases cited from 2 Philips, 3, and 15 Simmons, 376, do not appear to me to shew this objection fatal to the by-laws, nor are we to try their validity under such objections as if they were special demurrers to pleas in abatement. Many cases show that literal variances in the use of corporate names, if substantially correct, are immaterial.—Cary, 44; 10 Cro. 122 b.; Moor, 581; Jenk.

99 ; Sal. 434 ; 2 Ld. Ray. 1239 ; Gilb. Rep. 250 ; 1 And. 23, 190, 202, 219, 248 ; 1 Leo. 39 ; 1 Saund. 340 ; 1 B. & P. 40, 42, 344 ; 6 Taunt. 467 ; 2 Mar. 174 ; 1 C. & P. 569 ; R. & M. 190 ; 7 Taunt. 546 ; 1 Moor, 267 ; 1 C. M. & R. 296 ; Stephens on Corporations, 164, 418 ; 15 Ju. 15, 190.

I find no case in point of the objection of misnomer to a name used in a by-law ; the objections relate principally to deeds and conveyances, but I perceive no material distinction in principle ; the name adopted is substantially, although not literally, that given by the statute. If the warden and county council, or the county council (which is the body authorized) passed the by-laws, the municipal council passed them, for the county council and the municipal council of the county is the same, and there is no room for uncertainty or doubt respecting its identity. I am disposed thereof to hold the name sufficient, there being no doubt (however named) but that the municipal council of these counties did in fact make the by-laws ; and I entertain the opinion that if they were traversed in a replication to a plea justifying under them as passed by the municipal council of the counties, &c., using their correct name, they would support the plea in evidence, and that the variance would not constitute a fatal objection.

Secondly, I think it must be intended that the whole sum of 4,850*l.* 10*s.* 5½*d.* was due before the 1st January, 1849, I perceive no room to presume any part of it a present debt to be paid at a future limited time.

The first by-law recites that the late municipal council of the district of Huron was, prior to the 1st January, 1849, in debt to a large amount—that is to say, to the amount of 4,850*l.* 10*s.* 5½*d.*, with interest (not however stating from what day) which sum it was expedient to raise to meet the demands on the said late district. The last by-law distinctly states the debt to be due. The statute 12 Vic. ch. 81, sec. 182, mentions debts *bona fide* due prior to the 1st January, 1849. The by-laws do not use the words “*bona fide*,” but if the debt is admitted to be in fact due, it must be presumed, unless the contrary is shewn, to be *bona fide* due. I see no reason for placing any other construction upon

them ; and if in fact the debt was due, the uncertainty in the recital would not make the by-law void or illegal.

The first by-law may be read as directing one half-penny in the pound upon the assessed value of all lands liable to assessment, in order to determine the amount to be raised, and then as directing the amount so ascertained to be levied out of such lands and other ratable property to be apportioned accordingly ; in which event the sum so apportioned would of course be less than one half-penny in the pound upon the whole. The reading contended for by the municipal council is, one half-penny in the pound to be levied and raised upon all lands liable to assessment and other ratable property ; and, referring to the title (which I regard as a part of the by-law), and to the recital to the second by-law of the 16th of April, and construing both together, it will be manifest that such was the intention, though imperfectly expressed, apparently owing to the accidental omission of a few words in transcribing the fair copy from the draft of the by-law ; and I think it should be construed, so far as it reasonably can, to fulfil the intent. The words "one half-penny per pound upon all lands liable to assessment," leave it questionable what is meant, unless it be one half-penny per pound, not upon all lands, but upon the aforesaid value thereof.

I think the by-law may, without violence, be understood as in the first place mentioning lands liable to assessment, in order to designate the lands to which it was to relate, and having done so, then enacted that one half-penny in the pound should be levied and raised on such lands and other ratable property ; and, as it will best accord with the intention, I am disposed to adopt this view, and to read it as if it had said one half-penny in the pound to be levied and raised on all lands liable to assessment, and other ratable property. Then, as to the uncertainty touching the meaning of "one half-penny in the pound on such lands and property," whether upon their full or yearly value, or once for all, or repeatedly, or periodically, or yearly, or how otherwise, there is an ambiguity upon this head ; but considering that the usual course of proceeding in Upper

Canada, from the beginning, has been by yearly assessments of lands and certain personal property at a value fixed by statute, and that the district or county rates have usually been declared at so much in the pound upon such value for the year, and that the rate per pound was until very recently limited in amount by statute, and advertng to the language of the legislature in the statute 13 & 14 Vic. ch. 67, secs. 10 & 11, I am disposed to hold that, as used in this by-law, the words "one half-penny in the pound" should be construed to mean yearly rate for that sum upon the assessed value of the ratable property mentioned therein.

By sec. 10 of 13 & 14 Vic. ch. 67, it was enacted that all taxes which had been levied and assessed during the present year 1850 (see sec. 68), should be held and taken to be taxes for that year, ending the 31st December, and that thereafter the taxes levied or assessed for any year should in all cases be considered and taken to have been imposed for the then current year, commencing with the 1st of January and ending on the 31st December, unless otherwise provided for in the enactment or by-law imposing the same; and sec. 11 enacts that the sums required by law, or by any by-law of any township or county, for any lawful purpose, shall and may be taxed, rated, and raised—upon estimate of the amount required for any such purpose for each year in which such tax is to be levied; but in cities or incorporated towns, &c., the taxes shall be imposed by by-law, declaring the yearly rate in the pound to be levied on the yearly value of all taxable property—the mode of determining the yearly value being provided for by that statute.

The third objection suggests the way in which the by-law ought to have been prefaced and the rate declared; not so much in the pound, which may be more or less than the sum authorized and required to be raised, but so much in the pound upon the assessed value of all ratable property as would in the aggregate be equal to that amount, or the whole sum required equally apportioned upon the whole ratable property.

This objection involves the main question. It is to be

observed that we are not a court of appeal from the municipal council or their by-laws, as the courts of quarter sessions are in England in relation to many rates authorized there. No appeal is provided for against rates imposed by by-laws like the present. We are only empowered to quash them for illegality. By the statute 12 Vic. ch. 81, sec. 155, illegality may consist in all defects patent on the face of them, or shewn by collateral facts to be proved; the main consideration being, whether the jurisdiction and powers have been exceeded or improperly exercised. We have therefore, on this occasion, only to determine whether the by-laws are illegal on the face of them, for nothing collateral or extraneous is laid before us to impeach them.

The most material statutes in England are the 55 Geo. III. ch. 51; 5 & 6 Wm. IV, ch. 76, sec. 92, and 7 Wm. IV. and 1 Vic. ch. 81, sec. 2. The analagous cases are applications to quash rates, &c., imposed by commissioners, overseers, &c.; and the distinction between appealing from and quashing for illegality is pointed out and carefully marked therein.—Cro. Car. 395. Douglass, 116—A rate cannot be made to repay money borrowed. 1 Salk. 526—That a standing rate is not allowable. *Ib.* 523, 532, 482, 531; 3 Sal. 232; 6 Mod. 97.—Retrospective rates not allowed 8 Mod. 10—If a poor rate for a year when it should be for a quarter, the Court will order the levy of a quarter only 2 Bur. 1152; 6 T. R. 580—The distinction between quashing and appealing, and that a prospective rate is good. 12 East. 556—A retrospective rate not allowable. 1 N. R. 187; 7 B. & C. 314: *ib.* 339; 10 B. & C. 792; 5 B. & A. 761—A rate for an antecedent debt is bad.—1 D. & R. 470, S. C.; 2 D. & R. 843, S. C.; *Queen v. Mayor of Bridgewater*, 10 A. & E. 281; *Woods v. Reid*, 2 M. & W. 777; 10 M. & W. 703; *Rex v. Sillifant*, 4 A. & E. 354; 7 A. & E. 713; 4 M. & W. 621; *Pallister v. Mayor of Gravesend*, 19 L. J. C. P. 358; 15 Ju. 15, 190; 20 L. J. N. S.

A test of the legality of rates in some of the above cases may be applied in this case—namely, a justification under the by-law pleaded by the collector to an action for levying the rates thereby imposed, where the question would be

whether it authorized the levy. If legal, they would afford protection; if not legal, they would constitute no defence, unless the proviso to sec. 155 might be available.

The 4 & 5 Vic. ch. 10, sec. 41, limited the district rates to two-pence in the pound on the assessed value; and the present by-laws (exclusive of others for other objects) do not exceed that sum; but that statute was repealed by the 12 Vic. ch. 80, and I do not find that the amount of the rates per annum is now limited (see 13 & 14 Vic. ch. 67, sec. 11), or that it was so in February or April, 1850. If the present by-laws (except in so far as the same may affect any rates or taxes for the year 1850), are repealed by the 13 & 14 Vic. ch. 66, sec. 1, with obvious reference to the 13 & 14 Vic. ch. 67, secs. 12 & 31, and are not saved by the 13 & 14 Vic. ch. 64, sec. 14, as not having been passed under the 177th section of 12 Vic. ch. 81, therein mentioned, the only question is, whether they are legal so far as they impose single rates of $\frac{1}{2}d.$ and $1\frac{1}{2}d.$ in the pound for the year 1850. Their validity for one year is to be determined under the 175th and 176th sections of the last act, and as continuing from year to year under sec. 182.

The 175th sec. transferred all debts of the old corporation to the new one, secured and payable in like manner, and sec. 176 required the latter to take charge of such debts, and to direct the levy by tax upon the locality over which it had jurisdiction, of such sum in each year as should be necessary for the payment of the interest therein, and to pay off the principal according to the contracts and obligations which should have been entered into in that behalf. Now the intendment being, as I have already stated, that the principal sum mentioned in the by-laws was due and payable prior to the 1st January, 1849, and remained unpaid when they were passed, the above mentioned section, irrespective of sec. 182, required the corporation to make provision therefor; had they omitted to do so, I apprehend a mandamus might have been moved to compel them; or, if they had only made partial or inadequate provision to meet the demand—as by rate of $\frac{1}{2}d.$ in the pound when $2d.$ was required—a like measure might have been adopted to enforce a further rate.

That one half penny in the pound was insufficient, does not in any way appear except by the supplementary by-law adding $1\frac{1}{2}d.$ thereto; whether these sums together would, according to the assessed value of the ratable property, realize the full amount of the debt and interest, or fall short thereof in any great degree, does not appear. If they would unreasonably exceed it, that, if proved, might be a good reason for quashing the by-laws, or the last of them at all events, for the excess—but as it is not shewn, it is not so to be presumed; and for the disposal of any casual surplus, the 13 & 14 Vic. ch. 67, sec. 12, makes provision. If they fall materially short of the requisite sum, the corporation would remain liable to the suits of the creditors, and to the remedies afforded in the 12 Vic. ch. 81, sec. 179, unless they entitled themselves to the protection of the 182nd section, and which it would be for them to establish; or, if there was no other legal remedy, a mandamus requiring them to impose an additional or adequate rate might, I suppose, be obtained. In the absence then of any proof that the rates in question either exceeded or fell short of the amount necessary for the discharge of the principal and interest due and payable when the by-laws were passed, it is reduced to the mere technical point, whether such rates should necessarily have been stated to be the sum or sums in the pound which the debt of 4,850*l.* 10*s.* $5\frac{1}{4}d.$, and interest thereon, bears to the whole assessed value of all the ratable property, real and personal, &c., a fact which could not truly have been alleged of the first by-law, as shewn by the second; and whether the by-laws are void because it is not therein so stated—in other words, whether a rate of so much in the pound upon the assessed value, without stating the proportion it bears to the whole assessment as compared with the whole debt, is invalid and illegal.

Novel as all questions arising under corporate by-laws of this kind are to me, and unaided by English authorities bearing expressly on the subject, I naturally express my opinion with distrust; but so far as I am able to judge, I think it was competent to the municipal council at the

period when these by-laws were made to levy a rate or tax (whichever it be called), if a specified sum in the pound upon the assessed value of all ratable property for the purpose mentioned, it being a definite sum in itself, and the aggregate amount capable of being ascertained by computation upon reference to the assessment returns, and also being a well known mode of apportioning and levying rates; whether that amount would be more and less than the debt to be paid would not be known till the computation was made, but it may have been made, and may have formed the basis of the rates, for all that we see to the contrary; but if not, the by-laws provide for the realization of a sum equal in amount to $\frac{1}{2}d.$ and $1\frac{1}{2}d.$ in the pound upon the assessed value of all ratable property within the united counties, and the object is clearly pointed out: they might have been more formally and better framed, but I am not prepared to say they are illegal. The debt to be paid—that is, the sum to be raised—is specified; and the rates are imposed, not by aliquot proportions, but by named sums in the pound, which are equivalent although they are not declared, nor do they appear to be aliquot proportions that the sum wanted bears to the total amount of the assessed value of the property liable to assessment; they are equal specific rates of so much in the pound for a specific and legitimate object, and there is nothing to invalidate them as being either excessive or illusory. I think the intendment should be in favor of the reasonableness of the rates in point of amount, at all events. I cannot say that because the sum to be levied may be inadequate or may be excessive, or that because it is not declared to be an aliquot apportionment, although it is an equalized rate, the by-laws are therefore illegal and should be quashed; on the contrary, I think it was competent to the council to levy a rate in the year 1850, for the payment of this debt, and that if through inadvertence or mistake the first by-law was, as expressed in the second, “totally insufficient,” that it was also competent to them to supply the deficiency by a second rate or by-law. The 12 Vic. ch. 81, sec. 41, confers upon the municipal council of each county power and authority to

make by-laws for the repeal, alteration or amendment, from time to time, of all or any of the by-laws which they are thereby empowered to make, and to make others in lieu thereof as to them might seem expedient for the good of the inhabitants of their county, subject only to restrictions which did not apply in the present instance. The provision thus made being inadequate, would not render the by-laws illegal or void; I should suppose them good *pro tanto*; and it is not pretended the amount is excessive, unless it is to be levied year after year indefinitely or permanently; the probability is, that a single rate of 2*d.* in the pound or for one year only would be insufficient; that it would be, is the most reasonable inference from the terms of the by-laws, which were probably meant to provide yearly rates prospectively for the gradual satisfaction of the debt, with a view to the advantages to be secured under the 182nd section; that object may be defeated, owing to the imperfect language of the by-laws, but that is not a sufficient reason for quashing them, if, as I think, they are valid to impose single rates for the year 1850. I do not see that it is a good ground for quashing a by-law that it is prospective, if in legal construction it is not so. Its being doubtful is no sufficient reason; because wherever the point is determined it is no longer doubtful; nor will its being intended suffice, if the intention is not sufficiently expressed, and therefore cannot be fulfilled; if it is continuous and to be repeated yearly—and that is legal—the vagueness of the terms in which the by-law is framed ceases to be objectionable when that effect is pronounced to be their legal construction; but if only valid for one rate, and it is so far valid, it is no reason for quashing it, that it aimed at more than it accomplished; it must appear that if suffered to stand it would accomplish something illegal—not through a misconstruction of its meaning and effect by those who enforced it, but by their giving effect to what it does express and mean—at least such are my impressions on the subject.

This virtually disposes of the remaining objections. If the effect of the by-laws is to continue the rates yearly until the whole debt is paid off, their duration is expressly

limited by that event, which fixes the period for their cessation. It cannot be intended that the sums to be levied will not at any time suffice to satisfy the debt, or that the tax may for that reason continue for an indefinite period or permanently, or that the by-laws contemplate the payment of future as well as pre-existing debts. If the payment of the debt in full would, under the provision made, be postponed beyond twenty years (stat. 12 Vic. ch. 81, sec. 177), or if the terms of the 182nd section have been infringed or not complied with, and such facts were suggested and proved, a good ground of objection might be laid; but we have nothing before us but the by-laws themselves, and they do not display any such state of things. I think it was competent to the council to impose rates for a debt like this, to be levied in future years successfully. If such is their legal effect, they would be quite consistent with the 175th, 176th, and 182nd sections, taking together; consequently, if the by-laws direct rates of $\frac{1}{2}d.$ and $1\frac{1}{2}d.$, to be levied yearly until the debt is paid, I consider them valid on reference to section 182; if not, I think they certainly imposed one rate valid under sec 176, which, however insufficient in amount, was not illegal. Whether, expressed as they are, these by-laws have continuing force, and extend to after years, is a question of construction, depending in the first place upon the force of their own terms, and in the second upon the repealing act 13 & 14 Vic. ch. 66, (and see ch. 64, sec. 14); if on either account they do not continue, the rates cannot be repeated yearly. It does not follow that they are not valid to authorize a rate for the year 1850, and therefore saved by the exception contained at the end of the first section of ch. 66. My impression is, that if not repealed, and it is by no means clear that they are not, they do not operate prospectively—the terms used for continuing them until the debt is paid not being certain enough in a point respecting which great certainty was essential. Merely continuing a by-law till a debt is paid, and directing a rate to be repeated yearly or otherwise until such debt be realized, if not different things, are not unequivocally the same thing; and when a tax is to be

imposed the words used must be construed against and not in favor of the charge; but if not prospective, that is not a ground for quashing them if valid for single rates. They are valid for one rate, and if prospective and not repealed, they continue good for additional rates until the debt is made up, when they will cease—consequently, in either point of view, the application fails; at the same time it is so uncertain whether they are not repealed, and if not repealed whether they imposed successively yearly rates, that it would no doubt be the most prudent course for the municipal council to adopt such other provisions for the object in view as may be in their power, if any other effectual and unobjectional course be still open to them.

As to the first and second objection to the second by-law, I see no legal objection to a supplementary rate for the same object, the council being bound to direct the levy by tax of a sum sufficient to pay the debt according to the obligations upon them in that behalf.—12 Vic. ch. 81, sec. 176. As already observed, they might have been compelled by mandamus, as the omission might have exposed the corporation to actions at law, and thereby rates might have been coercively enforced through the sheriff, under the 179th sec. of the last mentioned statute—a consequence which might also follow the rescinding of the by-laws on this application. Lastly, I think the by-law of the 16th of April, 1850, sufficiently indicates the object and purpose of its being made, and that the rule should be discharged with costs. Had the by-law been quashed it would have been with costs; and, as the rules are discharged, the same consequence should follow. I hope it is open to either party to appeal to this decision, which I look upon as very important, both as a precedent and in its consequences in this case.

McLEAN, J.—By the act 12th of Vic. ch. 80, the act 4th and 5th Vic. ch. 10, under which municipal councils were first established in the several districts of Upper Canada, and 9th Vic. ch. 40, amending that act, are repealed; and by the act 12 Vic. ch. 81, municipal councils are established in the several counties, cities, towns, townships, and

villages in Upper Canada. By the first municipal act the several district councils were empowered to make by-laws for raising, assessing, levying, and appropriating such moneys as might be required for the purpose of carrying into effect all or any of the purposes for which the district council were authorized to make by-laws—which moneys were to be raised either by means of tolls to be paid in respect of any public work or works, or by means of rates or assessments to be assessed and levied on real or personal property or on both within the limits of such district, or in respect of such property, upon the owners and occupiers thereof.

By the 51st section of the same act (4 & 5 Vic. ch. 10), the powers which had been previously vested in the justices of the peace of the several districts, with regard to highways, or to the making of any rates or assessments for any purpose connected with any of the subjects concerning which power is given to the district councils to make by-laws, were vested in and to be exercised by the several district councils.

By this section the district councils were bound to exercise the powers of making any rates and assessments for purposes within their jurisdiction and control, in the same manner as the justices of the peace were previously by law required to exercise them; and then, by a reference to the act 59th Geo. III. ch. 7, sec. 7, it will be found that the several courts of quarter sessions were authorized, empowered, and required, after having ascertained the sum of money required to be raised for defraying the public expenses of the district, to divide and apportion the same upon each and every person upon the said rate rolls (rolls previously returned by the several assessors) named and liable to pay rates as aforesaid, so that every person should be assessed in just proportion to the list of his or her ratable property, real and personal, according to the rates in that act specified; and having ascertained the quota, dividend, or sum of money for which each and every person was to be so assessed for the current year, they were required to direct the clerk of the peace to transmit forthwith a certified copy of the assessment roll, so rated and ascertained, to the

several collectors; and such copies certified by the clerk of the peace, were declared to be sufficient authority for collecting the proportion or dividends within their respective townships. It became, on the passing of the act 4th and 5th Vic. ch. 10, the duty of the several district councils to ascertain the sum of money required to be raised for defraying the public expenses of their respective districts for the current year; and, having ascertained the amount, to divide and apportion the same upon each person named on the rate or assessment rolls liable to pay rates, so that each person should be assessed in just proportion to the list of his or her ratable property. It is much to be feared that not only the magistrates in quarter sessions, but also the district councils, lost sight of the provisions of the statutes as to the preliminary steps required to be taken before imposing a rate, and that, instead of imposing a rate to meet the probable expenses of their districts, they levied a tax without ascertaining any gross amount to be collected, and without reference to the objects to which when collected it was to be applied.

The 12th Vic. ch. 81, is silent as to the duty of county councils to ascertain the sum of money required to be raised for defraying the public expenses of their respective counties for each year; but by the 22nd sub-section and 41st section the several councils are authorized to raise, levy, collect, and appropriate such moneys as may be required for all or any of the purposes (over which county councils have jurisdiction), either by way of tolls to be paid on any county bridge, road, or other public work, or by means of a rate or rates to be assessed equally on the whole ratable property of the several counties liable to assessment, according to any law which shall be in force in Upper Canada concerning rates and assessments. The present municipal councils are required to make or declare a rate or rates, when necessary, on the whole ratable property of their respective limits; but the district councils, under 4th and 5th Vic, ch. 10, sec.39, were at liberty to raise money by means of rates, to be assessed and levied upon real or personal property, or both, within the limits of such districts;

while by the change made in this respect by the 12th Vic. ch. 81, the several councils are restrained from selecting any particular description of assessable property as the subject for a rate, they are at liberty to make more than one rate for the public objects within their control; so that in the event of any under estimate of the probable expenses of a year, or unlooked for contingences occurring, the councils may remedy the inconvenience which would arise from levying an insufficient rate—having express authority to raise money by a rate or rates for the purpose mentioned in the act; and the debts of the late municipal councils, being by the 176th section specifically placed within their charge as a duty, with authority under that section to levy by tax, upon the locality over which they severally have jurisdiction, such sum in each year as shall suffice for the payment of the interest thereon and the principal according to the contract and obligations which shall have been entered into in that behalf: and, as to any debt due *bona fide* prior to the 1st January, 1849, power being given to the present councils by section 182, within a year from the 1st January, 1850, to pass what may be termed a retrospective by-law, providing for the liquidation of such debt. I do not see that, to effect this latter object, the councils must necessarily be confined to one by-law. The object of the legislature was to enable the several councils to provide for the liquidation and discharge of debts due prior to the 1st January, 1849; and if in carrying out that object any council has inadvertently declared a rate which will not yield a sufficient amount, I cannot see why a second rate should not have been made within the time prescribed to remedy the mistake, and to provide effectually to meet the claims of creditors. It is true the 182nd section says that it shall be lawful for the several municipal councils within a year from the time appointed for the commencement of that act, to pass a by-law for the liquidation of such debt due before the 1st January, 1849, and it was no doubt contemplated that one by-law would be sufficient to effect the object; but when for other public purposes the councils have authority to make a rate or rates

it appears to me to be only a reasonable construction to place on the words of the 182nd section, that the councils might make within a certain period such by-laws for the liquidation of the debt referred to as might be necessary.

To the first by-law, it is objected that it does not distinguish what part of the 4850*l.* 10*s.* 5*d.* therein mentioned, was a debt *bona fide* due before 1st January, 1849, and what part a liability becoming due thereafter; but it appears to me that this objection is without foundation. The recital states that by the general statement of debts and liabilities laid before the county council it appears that the late Municipal Council of the district of Huron was in debt prior to the 1st January, 1849, in a large amount—viz., 4850*l.* 10*s.* 5½*d.*; and it was necessary and expedient to raise that amount, to meet the demands on the late district of Huron. Now, though a statement of debts and liabilities may have been laid before the council, and that statement may have contained sums not due on the 1st January, 1849, it does not follow that the sum of 4850*l.* 10*s.* 5½*d.* embraced any of such sums; on the contrary, it is alleged that from such statement it appears that the district of Huron was indebted to that amount prior to the 1st January, 1849; then it is alleged that it was necessary to raise that amount to meet the demands against the district of Huron: now there could be no demands against the council except for moneys actually due. It appears to me, therefore, that the by-law sufficiently alleges a debt of a specific amount, due before the 1st January, 1849. It is next objected to that by-law “that the enacting part does not sufficiently shew whether the rate of one half-penny in the pound therein mentioned is to be rated on lands alone, or on lands and other ratable property; and if the rate is upon lands alone it is illegal, inasmuch as the county council cannot direct any rate to be levied solely on any one particular class of ratable property. There is, no doubt, an omission in the by-law of the words—“and one half-penny in the pound upon all other property liable to be taxed”—this appears from the title of the by-law itself, by which it clearly appears that the intention was, that the rate should be made on lands and all

other ratable property. By law, the rate, whatever it may be, must be assessed equally on the whole ratable property of the county. Now the by-law in question says expressly that the rate of one half-penny per pound, is to be levied and raised on lands and other ratable property, so that all assessable property will be subject to the rate of one half-penny in the pound, as required by law. But the difficulty arises from the by-law declaring and enacting that "the sum of one half-penny in the pound upon all lands liable to assessment shall be levied and raised on such lands and other ratable property, for the purpose of paying off the said sum. It may be alleged that no greater sum can be raised than one half penny in the pound on the assessed value of lands only under this by-law—if so, still whatever that amount may be, it is to be levied on the whole property liable to assessment within the county, and the rate extends to all such property. But by the 3rd section of the by-law as well as its preamble, I think it is shewn that in fact the rate is declared on all other property liable to be assessed as well as upon land. By this section the collection of each township, after receiving a certified copy of the assessment roll, is authorized to demand from every person whose home appears upon the same the sum rated or charged against such person. Now it is well known that an assessment roll must contain all property in the possession of the several persons whose names are upon it, liable to be assessed; and the half-penny in the pound must be charged on the assessed value of each person's property, according to the roll, so that in fact the rate extends to every description of property liable to be assessed, notwithstanding the evident omission of the words referred to in the first enacting clause.

The third objection to this by-law is, that it does not enact that a specific sum of money shall be raised, and then declare a rate for the purpose of paying the same; but that the council assumes to impose a tax of one half-penny in the pound, which the council had no power to do, and which tax may prove permanent.

The more correct mode would undoubtedly have been for

the council to have declared the amount to be raised, and then to have declared the rate upon the whole assessable property, for the purpose of paying it. Here the amount of debt to be met is specified, and the rate is declared to be for the purpose of paying off that amount; but whether the rate will or will not be sufficient for that purpose is not stated, nor has this court any means of knowing except from the fact, of which they must take judicial notice from its being brought before them, that a second by-law has been passed to provide for a probable deficiency. Still this by-law, intended to meet a specific debt, if good upon the face of it, cannot be invalid because the amount to be raised may fall short of what the council contemplated especially when the extent of any such deficiency is not clearly shewn. The 179th section of 12 Vic. ch. 81, which prescribes the mode of proceeding for a sheriff on any execution against a corporation, points to the proper course for the several municipal councils in making a rate. It gives authority to the sheriff, in default of payment, to strike a rate according to the settled assessment rolls of the municipal councils, in like manner as rates may be struck by such municipal corporation for general municipal purposes, which rate shall be of a sufficient amount in the pound, according to such assessment rolls, to cover the amount due on the execution, with such addition as may be sufficient in the sheriff's judgment to cover the interest, &c. It is clear that a rate should be for a sufficient amount in the pound to cover the sum intended to be raised, together with the collector's per centage in levying such amount; but, if from any causes the rate falls short, I cannot find any authority for holding that a council is precluded from raising any deficiency by supplementary rate. In the case of *Jones v. Johnson and Morgan*, referred to in the argument, and reported in the first volume of *English Reports in Law and Equity*, page 418, Chief Baron Pollock says—"It was the duty of the borough council to make an estimate of the expenses, if by possibility that could be done, and to provide prospectively for those expenses; but," he says, "if a rate is made prospectively

and it proves to be insufficient, and another is wanted, it may be made. In ordinary cases there is no doubt that the municipal councils may make such number of prospective rates as may be found necessary under 12 Vic. ch. 81; but without the sanction of the 182nd clause of that act, the authorities established that the council could have no power to pass by-laws providing only for the payment of debts of old date, past due—12 E. 556; 1 Bing. 201; 2 Ld. Ray. 1009; 6 Mod. 97; 4 Q. B. 894: 2. M. & W. 777; English Reports, 418.

The fourth objection, that “the by-law does not appoint any definite period for which it shall continue in force, or shew that the rate of one half-penny per pound will suffice at any time to pay the debt,” is in part included in the third objection, which alleges that the tax may be permanent. It is not necessary to decide whether, under the 182nd section of the Municipal Act, the council had authority to impose a rate for the payment of the old debt, to continue in force and to be collected for several years in succession. It is clear they had a right to make such a rate for one year, and there is nothing in the by-law from which it can be gathered that the council intended the rate to be continued for more than one year. The 2nd clause of the by-law declares that it shall remain in force until the debt of 4850*l.* 10*s.* 5¼*d.*, and interest thereon, shall be fully discharged and satisfied: the effect of this would merely be to continue the by-law in force until the rate imposed by it should be collected. But, if it were quiet apparent that the council intended to continue the rate under that 2nd clause for several successive years, that portion of the by-law might be bad and liable to be quashed, still leaving the rate for one year untouched—but the clause, if intended to continue the rate beyond the year 1850, is repealed by the 13th & 14th Vic. ch. 66, so that it becomes now unnecessary to pronounce any opinion upon it.

That portion of the objection which is urged on the ground that it is not shewn in the by-law that the rate of one half-penny in the pound will at any time suffice to pay the debt, seems not entitled to much consideration: the by-

law imposes a rate for the purpose of paying off the debt, and it was impossible for the council to declare that the rate would be just sufficient for that purpose. They could not tell whether it would yield a little more or a little less than the amount, and therefore they were not called upon and did not make any declaration of the sufficiency of the rate.

The fifth objection—that the by-law provides no definite periods at which, or instalments by which, the debt was to be paid, and that no default can be shewn thereunder—appears to be equally without foundation; the periods of payment and the amount of payments must necessarily depend upon success in collecting the rate. As it was to be collected within a year, it must be presumed that the payment was to be made when the collection was completed; but it is clear the council could not state any time for the payment of any particular portion, nor could they state any particular amount to be paid at any specified period, as that must necessarily depend upon the amount of collections.

As to the sixth objection—that it does not appear whether the whole of the sum of 4850*l.* 10*s.* 5½*d.*, or what part, was due before the 1st January, 1849, and that it was not competent for the council to pass a by-law embracing sums to become *bona fide* due after that date—it is embraced in objection No. 1, and the observations which I have already made on that head will equally apply to this. I think it appears fully on the face of the by-law, whatever the fact may be, that the sum specified was a debt *bona fide* due by the Huron District prior to the 1st January, 1849. The 7th objection—that the by-law is not enacted by or in the legal name of the Municipal Council of the United Counties of Huron, Perth, and Bruce, and is therefore ineffective—is one entitled to a good deal of consideration; for if the by-law in question appears to have been passed by a body not recognized by law, it must necessarily be bad, if not wholly inoperative. The objection is, that it is ineffective, but if passed by competent authority, it must, as far as it goes, be effectual. The by-law is enacted by the “Warden and County Council of the United Counties of Huron, Perth, and Bruce, in council assembled;” and it professes to be

enacted by virtue of the powers vested in them by the act of 12th Vic. ch. 81. It is contended that the by-law is bad because not enacted in the name of "the Municipal Council of the United Counties." That the latter designation would be preferable in the enactment of any by-law may readily be admitted, inasmuch as the statute (sec. 32) declares that the powers conferred on counties as corporations shall be exercised by, and through, and in the name of the Municipal Council of such county, and declares that the town reeves and deputy town reeves of the several townships shall constitute the municipal councils for the several counties. The municipal council thus constituted is to exercise the corporate powers conferred on each county; but the question then arises, is any name prescribed by the act of parliament in and by which such powers must be exercised? The whole body of a county could not act as a corporation, except through particular agents, without very great and almost insuperable difficulty. It was therefore necessary to declare how each township should be represented in transacting the business of the county as a corporation, and to point out how the powers of the corporation should be exercised. The act accordingly declares that they shall be exercised by and through the municipal council, and in the name of the municipal council of the county. It is not declared that they shall be exercised by the municipal council by any particular name or designation; but it is declared that they shall be exercised in the name of the municipal council. Now it appears to me that when they are exercised by the body which forms the municipal council whether by the name of "the warden and county council," or by the name of "the municipal council," they are equally exercised by, through, and in the name of, the municipal council: none of these designations can leave a doubt upon the mind of any person as to the body which uses them—each will shew with the same certainty what body it is which makes a by-law, and no ambiguity can arise from the use of either. The statute recognizes the election of a warden by each county municipal council, and when the name of the warden and county council is used, no one can

fail to see that this name designates the municipal council of the county. Besides, the by-law in question is authenticated as the act of the municipal council of the united counties of Huron, Perth, and Bruce, by having the seal of that body attached to it. The copy is produced under seal of that corporation; and it cannot be objected to now, by the relator or complainant, that the original was under the seal of the municipal council of the united counties: moreover, the by-law on the face of it made by virtue of the powers vested in the body by whom it was passed by the act 12 Vic. ch. 81, and that act confers the power of making such by-laws on the municipal council of the several counties of the united counties. Under these circumstances, it appears to me that it is abundantly evident on the face of the by-law that it was passed by the body known as the Municipal Council of the United Counties of Huron, Perth, and Bruce; and that, though not passed in that particular name, it is nevertheless not ineffective or void on that account. If a deed were executed by, or to the municipal council of any county by the name of the warden and county council there is abundance of authority to shew that it would be valid on the ground that there could be no doubt or ambiguity as to the body who executed, or to whom a deed was executed; and, on the same principle, it appears to me that when no doubt or ambiguity can exist as to the identity of the warden and county council with the municipal council of Huron, Perth, and Bruce, their acts, in the execution of the power entrusted to them, must be valid.

The eighth objection—that it was not competent for the municipal council by one by-law to direct any special rate to be levied in future years for the payment of a debt due before the 1st day of January, 1849—is grounded upon the supposition that the council by their by-law intended the rate of one half-penny in the pound to be continued and levied for several successive years; but there is nothing on the face of the by-law to warrant such a supposition, unless it be that it is declared that it shall continue in force until the whole of the debt specified is paid. The only effect of that clause would be to keep the by-law in force for the

purpose of enforcing the collection of the rate which was imposed for a year, in case any portion should remain in arrear until the debt was discharged. It could not warrant the collection of the rate for more than one year ; and if it did, a clause having that effect might be void, but the rate still remains good for a year. The 182nd sec. 12 Vic. ch. 81 gives to the several municipal councils authority to raise rates for the payment of all debts due prior to the 1st of January, 1849; and if approved of by the head of the government, then certain facilities for proceeding against the corporations would be withdrawn, as respected such debts. The power of approval by the governor was no doubt given to enable him to see that the measures adopted were such as to ensure justice to creditors within a reasonable time ; but if a measure were passed extending the payments over several years, with the consent of creditors, I cannot see that if sanctioned by the governor in council it would be liable to any legal objection.

If a municipal council were to pass a by-law extending the time of payment of a debt due prior to 1st January, 1849, to a distant period, and making the amount payable by instalments, it can scarcely be supposed that such a by-law would be sanctioned ; and if not, creditors, under the 145th section of the act, would be entitled to sue for their debts, and enforce their immediate collection by a rate through the sheriff.

The ninth objection is—that the said by-law enacts that the said rate of one half-penny shall be levied in the first instance upon lands and other ratable property, which is illegal. This objection, I believe, is intended to apply to the phraseology of the by-law in declaring the rate. It enacts that the sum of one half-penny per pound shall be levied and raised on lands and other ratable property, for the purpose of paying off the debt. The term *levied* is perhaps improper in such a case, and *assessed* would probably be a more appropriate word—but the meaning is perfectly obvious ; and the third section provides for the rate being collected from the goods and chattels of parties liable to pay it, in case of default.

I have thus gone through all the objections taken against the by-law passed at the January and February session of the municipal council; and, after the fullest consideration, have come to the opinion, that though not so clearly expressed as it should be in some respects, yet it is sufficiently clear to be free from any fatal objection on that account; and that, being on the face of it within the scope of the authority conferred by the 12th Vic. ch. 81, and enacted *bona fide* for the purpose of meeting a debt due prior to the 1st of January, 1849, for which the municipal council had express authority to provide, the objections taken by the counsel for the relator, and urged with much ingenuity and force, are untenable.

Then, as to the second by-law, passed in aid of the first, and for the same object: I have already in effect stated my opinion that it is not liable to be defeated or quashed on account of its being a second by-law, avowedly for an object to provide for which had been the subject of a previous by-law. It is the constant practice in England to provide for deficiencies by subsequent by-law, or more than one in case of emergency; and it would be an unreasonable construction to place upon the act of the legislature that it could have the effect of preventing a municipal body from remedying an error into which it had fallen in the exercise of the powers conferred upon it by the act.

The second objection to this by-law, I think, is met by the whole tenor of the by-law itself. The fact of a special meeting being called by the warden in consequence of his finding that the provision made at the former meeting was totally insufficient to meet the liabilities of the united counties, is stated; and the resolution of the council to impose an additional rate of one half-penny in the pound on lands and other ratable property for the purpose of paying off the same debt, shews, I think, very clearly that the council when they passed this by-law were quite aware of the inadequacy of the former rate, and that it was on that account solely that the additional rate was declared.

The objection that the by-law is not enacted by or in the

legal name of the municipal corporation, and is therefore ineffective, I have already remarked upon, and it is unnecessary therefore to say anything more on that head. Admitting, for the sake of argument, that "the Municipal Council of the United Counties of Huron, Perth and Bruce," is *the* legal name of the corporation, it does not by any means follow that their acts in a name slightly different are illegal or void.

As to the fourth objection—that no precise sum is limited to be raised by the by-law, but that a tax is imposed of one penny half-penny in the pound on lands and other ratable property illegally—I think the amount to be raised is expressed in the original by-law, and it is stated to be the amount in which the Huron district was indebted prior to the first day of January, 1849. The by-law in question is to supply an anticipated deficiency, and it specifies expressly that the rate is "for the purpose of redeeming the debts due by the said counties prior to the first day of January, 1849, and interest on the same;" so that the amount to be raised is in fact specified and limited by the by-law.

I need not remark upon the 5th objection, or rather the series of objections contained under the 5th head, as I have already expressed an opinion upon the several matters to which they relate, which are also urged as grounds of objection against the first by-law.

The sixth objection to this by-law is the same as the eighth objection to the former one, and I need not therefore make any further comments upon it.

The last ground of objection is, that the by-law seeks to impose a sum beyond the jurisdiction of the municipal council: the rate of a penny half penny in the pound on the assessed value of lands and ratable property cannot be said to be beyond the jurisdiction of the council. They had authority by the act to make a rate sufficient to pay off debts due prior to the 1st January, 1849, and they were not limited in the amount of such rate. Whether the two rates will be sufficient, or more than sufficient, to pay off the debt, does not in any way appear. There is no objection urged on the score of the rate being excessive for the

purpose intended; and, should it prove insufficient, and default in consequence be made, the parties interested will have their legal remedy against the present council. The legislature have provided for cases where more may be levied than may be necessary for the specific objects intended, where executions may be satisfied by a rate through the sheriff; and should there be any excess beyond the amount required to be raised under the by-law in question, such excess will of course, as in the former case, form a part of the general funds of the counties, and become applicable to general purposes.

There are now so many corporations in this part of the province entitled to raise moneys for public purposes within their limits, by rates on the assessable property of the inhabitants, that it becomes very important that the extent of their authority and the proper mode of proceeding before making a rate, and then declaring one, should become generally known and understood. I fear the impression is too general throughout the country that the several councils may impose a tax of a specific amount in the pound, without reference to the sum to be raised, the period within which it must be raised, or the objects upon which it is to be expended. A reference to the 179th section of the act 12th Vic. ch. 81 will shew the mode of proceeding intended by the legislature to be adopted in making a rate, and the provisions of that section, so far as they are applicable to ordinary rates, cannot be too closely adhered to. It should be borne in mind that it is not competent for any corporation to borrow money to be paid after the expiration of the current year, without imposing a rate over and above all the rates to provide for its repayment within the period of twenty years; and that the legislature evidently intended to require that each year's public expenses should be paid by the corporation of the year; and that no debts should be contracted, to be paid at a subsequent period from funds to be raised by a succeeding corporation, without providing by a special rate for that object. The same policy has always been observed in England; and if it were otherwise, a strong inducement might be afforded to incur large debts

for particular objects, and to leave the duty and the odium to future corporations of providing the means of discharging them.

SULLIVAN, J.—As to the question raised upon the critical construction of the first by-law, excepted to upon these motions, there seems to be no doubt but that, upon the transcript of the by-law from the draft actually sealed, some words were omitted, which omission gives rise to this question. The by-law as passed by the council, in its enacting part, has these words :

“That the sum of one half-penny in the pound upon all lands liable to assessment within the said county be levied and raised on such lands and other ratable property.”

It is contended, on the part of the relator, that the by-law should be quashed, because it means that the rate should be levied upon lands alone, whereas the statute 12 Vic. ch. 81, sec. 41, requires rates to be assessed equally on the whole ratable property of the county liable to assessment ; and that it is equally inoperative if it be held to mean that a sum equal to one half-penny in the pound on all lands be levied on such lands and other ratable property, for then, that the rate would not be declared at all ; and moreover, that if the by-law leaves it uncertain whether lands alone, or lands and other ratable property are to be rated, then the by-law is void for uncertainty.

On first looking at the by-law it occurred to me, and I now think that the words “upon all lands liable to assessment within the said county,” are manifestly repugnant to the words “be raised and levied on all such lands and other ratable property,” and that they cannot be construed together ; and, inasmuch as the former would be senseless without the latter, and the latter having meaning without the former, we are therefore at liberty to strike out and reject the former sentence as surplusage, and then see whether the by-law would be good without it.

Leaving out the first phrase, the by-law would read thus : “that the sum of one half-penny in the pound be levied and assessed upon all such lands and other ratable property.” Then the word *such* may either be rejected or refer to

the lands before mentioned. If rejected, the only question would be, whether the by-law would be void for want of specifying that the lands to be rated were within the county? and I think we reasonably may infer that the county council intended property within the county, which they had the legal authority to tax. If the word *such* be returned with its reference to the preceding words, it would only make this intendment the more certain, at least as regards lands.

If we read the enacting part of the by-law thus: "that the sum of one half-penny in the pound upon all lands liable to assessment within the said county be levied and raised upon such lands and (levied and assessed) on other ratable property, the whole sentence is sensible, and it is not bad grammar to understand the verb as understood to be repeated as governing several objects.

I am of opinion that we should do no violence to the construction of the by-law by holding that it sufficiently, and without fatal uncertainty, expresses the meaning which we happen to know was intended, and which, so far as this objection goes, would make it a good by-law.

The second objection is, that the by-law does not, by recital or otherwise, shew that the debt for which it means to provide is due and payable, or was to fall due and payable within the year.

The statute 12 Vic. ch. 81, sec. 41, sub-sec. 22, gives power to the county councils or municipalities to pass a by-law or by-laws to raise money for all or any of the purposes *aforesaid*, either by way of tolls to be paid on any county bridge, road or other public work, to defray the expense of making, repairing or maintaining the same, or by means of a rate or rates to be assessed equally upon the whole ratable property of such county liable to assessment, according to any law which shall be in force concerning rates and assessments.

In the preceding sub-sections are enumerated various purposes for which the municipal council of each county have power to pass by-laws—in which, however, are not included the purpose of paying debts of the county; but I find the thirty-sixth section of the act, after charging upon

the counties the expense of repairing and keeping in repair gaols and other public buildings, concludes as follows : "and it shall be the duty of the municipal council to cause the same to be repaired and kept in repair at the expense of the county, and to raise by rate upon the county all sums of money which shall be necessary for such purpose, and for every other purpose, the expense whereof shall be by law chargeable upon the county."

Sec. 176 makes it the duty of the municipal corporations to take charge of former debts of the localities under their jurisdiction, and to direct a levy by tax upon the same, in each year, as shall be necessary for the payment of the interest, and as shall be sufficient to pay off the principal, according to the contracts and obligations which shall have been entered into in that behalf.

Sec. 175 makes the new municipalities liable to have old debts recovered and enforced against them as against the old district councils.

Sec. 177 makes it the duty of the municipal corporation to cause to be assessed and levied upon the whole ratable property, &c., a sufficient sum of money to pay all debts incurred or to be incurred, with the interest, to fall due within the year.

Sec. 179 provides for rates to be made under executions in the sheriff's hands against the municipalities.

These are the powers of the county councils, and the facilities, and increased facilities, given to these creditors for the payment on the one hand and the recovery on the other of old debts charged upon the municipalities.

Sec. 182 provides a means for the council to relieve the municipality from these stringent provisions, with respect to to any debt *bona fide* due by any municipality, by enacting that "it shall and may be lawful for the municipal corporation, at any time within one year, to pass a by-law for the liquidation of such debt; and upon such by-law being passed and approved by the governor in council, that none of the increased facilities shall be applicable to such debt, until default shall be made in raising the necessary funds, or in applying them according to the provisions of such by-law."

The remainder of this section enables municipalities, with the consent of their creditors, to substitute notes or debentures for those already issued.

It appears to me that the objection to this by-law that I am now considering is merely to the want of recital, or of sufficient correctness or particularity of recital, in the by-law. The by-law shews that it appeared by a general statement of debts and liabilities laid before the county council that the late municipal council of the Huron district was, prior to the 1st day of January, 1849, in debt to a large amount—viz., to the amount of 4,850*l.* 10*s.* 5¼*d.* with interest—and the by-law then recites the necessity of raising money to meet that demand. It is not recited that the whole or any part of the money was payable in the year 1849; and under the 175th, 176th, and 177th sections of the act it was not the duty, and probably was not within the powers of the municipal council, to provide by rates for the payment of the debts incurred by the district council, except as such debts should fall due, according to the contracts or obligations under which the debts were incurred; and, if the debt recited were in fact payable according to contract in the year 1849, then it would be the duty of the council to meet the demand, and to provide for its payment by rate. No authority was cited; neither have I found any making recitals necessary in a by-law, or in any other law. There is nothing recited in this by-law which, as to this objection, would make the law necessarily void. The validity of the by-law depends not upon the recital, but upon the fact whether the money was really payable; and I think that if the complainant wished to shew the by-law invalid, as needlessly anticipating payments, and thereby throwing upon him, he being a ratepayer of the year 1849, the burden of debts not payable by the ratepayers of that year, he should have shewn the fact by affidavit: he might have denied the existence of the debt, or he might have shewn that by contract the payments were to fall upon the ratepayers of future years. We have no information before us to shew that payments are anticipated. The by-law makes a rate for the purpose of meeting a certain debt; and if the

enactment and its purpose be sufficiently plain, and no facts appear to make either illegal, I do not see how we can interfere with the by-law.

It is objected, in the third place, that the by-law does not enact that a specified sum should be raised, and then declare a rate for the purpose.

It plainly appears, I think, from the statute 12 Vic. ch. 81, as well as from comparison with previous statutes authorizing local taxation, that the power delegated by the legislature to the justices, the district councils, and the present municipal corporations, was always intended to be the raising of certain aggregate sums, ascertained by estimate or contract of loan, by equal rates on ratable property, in contradistinction to a power exercised by parliament of levying duties and taxes often founded on estimate, but not necessarily so. By the 59th Geo. III. ch. 59, for example, sec. 7 authorizes the justices assembled in quarter sessions, *after having ascertained the sum of money to be raised* to defray the public expenses of the district, to divide and apportion the same upon every person liable to pay taxes as aforesaid; and the rate for the year was limited in the same section to one penny in the pound upon the assessed property. The same statute, section 8, to guard against unnecessary assessment, provides that no new assessment shall be made until it shall appear that the money collected by the preceding rate shall have been expended—thus evidently contemplating that the estimate by which the sum to be raised was to be ascertained would only be an approximation to the true amount. The statute 4 & 5 Vic. ch. 10, sec. 39, gives the district councils power to assess, levy and appropriate money for the purposes mentioned in the act; and sec. 41 provides that the amount to be raised under any by-law should be limited by such by-law, and should afterwards be apportioned and assessed equally upon assessable property. Thus we see the nature of the power of taxation conferred on the district councils, and that it was like that previously exercised by the quarter sessions—the raising previous ascertained sums by way of an equal assessment; and the act required the sum to

be raised to be limited by the by-law itself. The act 12 Vic. ch. 81, is not so explicit; sec. 41 enumerates the purposes for which the county municipalities are authorized to make by-laws; and in sub-section 22 power is given to the county municipalities to raise money for the purposes aforesaid by means of a rate or rates, to be assessed equally on the whole ratable property of the county liable to assessment. Thus the sum to be raised is not directly required to be ascertained previously to making the rate, or to be limited in the by-law. But it seems to me, from the nature of the powers exercised by the municipalities, and from the words of the 41st section, that money cannot be levied without a previous ascertainment, first, of the purpose or purposes for which it is required: nor, secondly, without an approximating estimate of the amount required for such ascertained purposes. It is this amount which is to be equally assessed, and which includes the amount of the assessment. It possibly would not be held necessary under this section to state in the by-law the aggregate amount; it may be sufficient to have that amount in fact previously ascertained; but at all events I think it should be ascertained; in other words, I feel satisfied that it is not under this act competent to the county or other municipalities in the first place, to create by tax a revenue unknown in its amount or in its purposes, and afterwards to invent means of spending the money collected. I think that parliament meant to limit the power of municipalities to the levying by equal assessment the amount necessary to be raised, and that only; and to find how much is necessary, the purposes for which the money is wanted as well as the amount, must first be discovered.

Perhaps it may also be said that in case of a debt payable before the 1st January, 1849, there is no power given to the municipal councils to make a retrospective rate, unless acting under the 182nd section; for, though the council is bound to provide for debts as they fall due, power is not given, unless by that section, for providing for past debts. There are very many authorities against retrospective rates, as well as against rates prospective, which have the effect

of throwing the burden of taxation upon persons other than those who have the benefit of the services performed, or of the money expended. I think this is not a by-law under the 182nd section, because it does not provide for the liquidation of the debt at any certain period, or in any certain manner; but it is difficult to say that under the act which makes it the duty of the councils to take charge of antecedent debts, and which furnishes coercive means for raising and levying money by execution, that the power is not implied of making rates for these debts, though the exercise of that power may not, unless with the assent of the governor in council, and pursuing the 182nd section, save the corporation from an execution, if the creditor wishes to proceed for the recovery of his debt in that manner. The 182nd section gives authority, with the consent of creditors, to substitute new promissory notes or debentures for old ones, and to provide for their gradual extinction by redeeming a certain portion annually. It may be said that without the consent of creditors, and without a by-law assented to by the governor in council, the county may be subjected to two rates for the same debt—the one under a by-law, the other under an execution; still I have a difficulty in denying to the council the right to make a retrospective rate, in regard to the old debts of the district; as regards new debts, the rule of the statute is sufficiently stringent. It is not, however, necessary to decide this point, because, for aught that is shewn to us here, the whole of this debt may only have fallen due in the year when the by-law was made, and when it was the duty of the council to provide for its payment.

Cases of retrospective county and church rates:—

Tawney's case, 2 Lord Raymond, 1009; *Stevens v. Evans*, Burr. 1152; *Rex v. Chappelwardens of Heyworth*, 12 E. 556; *Luncheater v. Thompson*, 5 Mod. 4; *Rex v. Sillefant*, 4 Ad. & El. 355.—Said that their rate being retrospective, is no objection if good on the face of it; that objection must be taken in passing accounts.

Rex v. Justices of Flintshire, 5 B. Al. 761.—The court granted a certiorari to remove a county rate, observing that this was a rate to reimburse persons for a debt previously

contracted, which was clearly bad, inasmuch as the justices had no right—except by following the provisions of particular acts of parliament, which had not been done—to anticipate the county rate, so as to make the expense ultimately fall upon very different persons from those who were by law liable at the time it was incurred.

Rex v. Mayor, &c., of Gloucester.—Retrospective rate bad, if it so appeared on face of it; otherwise, if it appear legal. The court will not hear objections in fact; these should be made on passing accounts.

Woods v. Reed (2 M. & W. 777) is the case of a rate under the Municipal Corporation Act, 6 Wm. IV. ch. 76. The difference between an estimate meant to charge an expense upon the current year: Alderson, B.—“The general principle is, that you cannot charge a man for services which have been of no use to him. Of what benefit are the services of a last year’s recorder to a man who comes to reside in the borough this year.” In answer to an argument of counsel—by sec. 83 special constables are to be called out in case of need, and to be paid a certain amount per day. This is a demand which could not be foreseen or estimated—Alderson, B.: You might urge the same argument as to county and poor rates—the answer is, you must have the money in hand.” Lord Abinger, C. B.: “They would then provide for the extraordinary expense out of the funds in hand, and immediately make a new rate to supply it.” The general inconvenience of retrospective rates has been long known and recognised in the courts of law, on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have the sole benefit. Alderson, B.: “The council is much more likely to be economical when the money is to come out of their pockets in the first instance, than when they first incur the debt and afterwards provide the means for paying it; otherwise, the council might impose upon the borough the cost of having salaries, and leave upon their successors the odium of levying money to pay them.” In this case a good form of a rate is to be found; the sum to be raised and the rate in the pound are

both stated.—See also *The Queen v. The Recorder of Bath* (9 Ad. & El. 873). *The Queen v. The Town Council of Lichfield* (4 Q. B. 894).—Where an order for the payment of a sum of money to reimburse the late mayor was removed by *certiorari* to the Queen's Bench, and quashed—*The Queen v. Town Council of Stamford*—(4 Q. B. 900 n. a.) In the *Queen v. The Mayor, &c., of Gloucester* (5 Q. B. 862) the court ordered a mandamus to compel payment of the fees of the clerk of the peace; and when it was suggested that this might make a retrospective rate necessary, left the defendants to allege that fact, if so, upon the return of the mandamus; and Lord Denman seems to say that would be a good reason for not obeying the mandamus—*The Queen v. The Mayor of New Windsor* (7 Q. B. 908). *The Queen v. Mayor, &c., of Warwick*.—The corporation executed a bond for payment of an annuity to a person removed from office, under corporate claims (5 & 6 Wm. IV. ch. 76), and for payment on demand of arrears due before that date, the obligee consenting not to press for the arrears, the council passed a resolution to pay him interest thereon—it was held that such resolution and payment of the interest were liable to be quashed. Lord Denman, C. J.: “I think the statute gives no authority to pay interest on such bonds, as the compensation is to be assessed and the amount secured by a bond. The arrears are to be paid on demand. If the town council for the time being wish to postpone the payment, they must do so by some arrangement amongst themselves, but cannot throw the interest on future members of the corporation—See also note a. to page 929. *Cobb v. Allan* (10 Q. B. 682 is an interesting case, as shewing the mode and form of assessment under the Municipal Act, and as raising the question, whether under an order upon a parish to levy a certain quota of the entire assessment, stated in the order to be estimated at one shilling in the pound, a rate made by the parish of one half-penny in the pound was good, because a lower rate would not be sufficient to raise the amount required.

The late assessment law, 13 and 14 Vic. ch. 67, shews clearly the intention of the legislature to have continued,

as to the powers of taxation by the municipalities, with respect to the previous ascertainment of the amount and purposes of assessments. The 31st section enacts, that in every case in which any *sum* is to be levied for county purposes, the municipal council of the county shall, by by-law, direct what portion of such sum shall be levied in each township or incorporated towns or villages in such county; and it shall be the duty of the county clerk, before the first day of August in each year, to certify to the clerk of each township or incorporated town or village in his county, the total amount which shall have been so directed to be levied thereon in the then current year for county purposes. The 11th section of the said act provides, that the sums which shall be required by law, or by any by-law of any township or county for any lawful purpose, shall be taxed, rated, and raised upon estimate of the amount required for any such lawful purpose; but in cities and incorporated towns or villages, the taxes shall be imposed by by-laws declaring the yearly rate in the pound to be levied on the yearly value of all taxable property. The 12th section provides, that whenever the amount of taxes which shall be assessed on any township or county, incorporated town or village, for any purpose, shall exceed the charges for such purpose, the overplus shall go to the reduction of the tax in the next year for the same purpose; or, if such purpose shall have been accomplished, then to the reduction of such other tax as the municipality shall see fit to direct. And if the amount of taxes so assessed for any purpose shall be less than the charges for such purpose such deficiency shall go in increase of the tax for such purpose in the succeeding year. There is an addition to this section which I do not understand—"but in cities and incorporated towns or villages, the amount assessed and levied shall form part of the general funds at the disposal of the corporation, unless otherwise specially appropriated." It is not however necessary to the solution of the present question to discover its meaning.

The latter statute was not passed at the time of the making of the by-law in question, and I have only cited it

by way of illustration; and the statute preceding the 12 Vic. are in like manner only illustrative of the powers granted by the legislature to subordinate bodies to shew that it is not a power of taxation with a view to unascertained purposes and amounts that has been conferred, but the contrary.

The statute 59 Geo. III. ch. 8 imposes a tax upon the lands of absentees for the purposes of highways and roads; but the tax is fixed at so much per acre. It is called a rate or assessment, but it is not strictly so: it is not an imposition of any sum equally amongst rate-payers, but a tax without any reference to any amount required, and it is directly imposed by parliament.

In some instances, the legislature have authorized what was called a rate to be levied, and fixed the amount of the rate per pound to raise additional funds for the payment of debts incurred in the building of gaols and court houses: for example, 7 Geo. IV. ch. 14, sec. 3, where the justices of the District of London are required to impose a rate of one-third of a penny in the pound until the sum authorized to be borrowed should be repaid. In this case, the amount to be raised in each year was not to be ascertained by the order of sessions; though by the 59 Geo. III. ch. 7, it is required, as I have already observed.

The act 4 Geo. IV. ch. 24, for the erection of a gaol and court-house for the Home District, authorizes the justices in sessions to apply towards the expenses of the building all moneys arising from rates and assessments in the hands of the treasurer not required for ordinary or incidental expenses; though if the rate had been properly made, unless a sum were specially rated for the purpose of the building, the legislature had no ground for supposing any such surplus. I find the same species of appropriation in several other acts.

I believe, from perusing these acts, and it has otherwise come to my knowledge, that in practice the justices of the peace generally lost sight of the nature of the power entrusted to them, and of the enactment, which required them first to ascertain the amount necessary to be raised

before making a rate, and that they levied to the extent permitted by the statute—namely, one penny in the pound, without any reference to the aggregate amount to be raised. I believe the same course was followed by the district councils, notwithstanding that the 4 and 5 Vic. ch. 10 specially directed that the amount to be raised should be limited by the by-law authorizing the rate; but I do not think such practice legal, or that the orders of session would have been upheld if objected to on that ground.

But supposing it to be necessary, under the statute 12 Vic. ch. 81, that the aggregate amount should be ascertained before making a rate, and even that it should be limited in the by-law, it appears to me that it is so limited and ascertained by the one now in question. It is true that the by-law does not state how much of the sum mentioned is for principal and how much for interest. Neither does it specify how much interest is to accrue upon the debt; but it cannot make any difference as to the legality of the by-law whether the amount to be raised is for principal or interest, and it was not possible for the municipal council to ascertain the precise day or month in which future interest was to cease on the discharge of the debt. I think the amount is sufficiently limited and ascertained by this by-law; and, as nothing is shewn to the contrary, we are, I think, bound to take it as fact, that the halfpenny in the pound was intended to approximate to an equal rate for the purpose of raising that sum.

Another objection is, that the by-law does not appoint any definite period of time for which it shall continue in force or shew that one-halfpenny in the pound will at any time suffice to satisfy the debt. This objection assumes that the by-law imposes a rate to continue for more than one year. But the by-law simply enacts that the sum of one-halfpenny in the pound be levied. This, I think, refers only to one single rate. The second section enacts that the by-law shall be and remain in force until the whole of the debt be paid; but this does not amount to an enactment of a yearly rate. The law would necessarily have to remain in force for the purpose of compelling payment of

arrearages of rates, but its continuing in force will make no new rate. It is most probable that the municipal council intended a rate to be yearly levied, and this supposition is rendered more probable by the fact before us of a second by-law for the same purpose, which recites the inadequacy of the first provision. Yet nothing is shewn us but what the by-law itself contains, and this is but for one rate which we, in the absence of all information on the subject, must suppose to be *bona fide* intended to be sufficient to pay the whole debt and interest. The 176th section of the statute 12 Vic. ch. 81 makes it the duty of each municipal corporation to take charge of any debt which may be due, and to direct the levy, by tax, of such sum in each year as shall be necessary for the payment of the interest thereon, and as shall be sufficient to pay off the principal according to the contracts and obligations which shall have been entered into in that behalf. I think we must consider the debt mentioned in this by-law to have fallen due, or that it was to fall due, within the year, according to the contracts and obligations of the corporation; and that the by-law is a simple provision for the payment of the debts and interest according to these contracts and obligations. The 182nd section provides for another case—that is to say, where the debt is due and not intended to be paid according to the contracts or obligations of the municipality. It permits the council, with respect to any debt *bona fide* due before the 1st January, 1849, to pass a by-law providing for the liquidation of the debt; and upon such by-law being approved by the governor in council, none of the increased facilities for the recovery of debts given by the act shall be applicable to such debt. Thus, the municipality, with the assent of the governor in council, is permitted to make what is equivalent to a new contract for itself in the case of a contract already broken; but we do not know that the contract is broken here, or that the debt was payable before the 1st January, 1849, or that it was intended to postpone the payment. If the by-law were intended to suspend legal remedies against the corporation, I do not think it sufficient for that purpose, even with the

assent of the governor in council; for it does not provide that the debt shall be paid at any time, or in what instalments it shall be paid, or when they shall be payable; but I think a by-law may be good, imposing a tax for the purpose of paying a debt, though it may not be sufficient to suspend legal remedies, under the 182nd section. It is the duty of the council to provide by by-law for the payment of debts falling due after the 1st January, as well as for those due before that time; it is only with respect to the latter, however, that any legal remedy can be suspended by a new provision for the liquidation of the debt, with the assent of the governor in council.

It is then objected that the by-law is not enacted in the legal name of the municipal council of the said united counties; the 33rd section of 12 Vic. ch. 81, enacting "That the powers of the corporation shall be exercised by, through, and in the name of the *municipal council of such county*." The present by-law runs as follows: "Be it therefore enacted by the *warden and county council* of the said united counties of Huron, Perth, and Bruce."

Every modern corporation—that is, every corporation not so by prescription, has but one name, and must be called by that name. The municipal corporation in the present instance is empowered to make by-laws by, through, and in, a particular name. It is said (see Willcock on Corporations, 35) "An existing corporation may be empowered by statute or charter to do a particular act by a name different from that by which it was constituted or is usually known. If, in the execution of that act, it use the constituted name instead of that newly conferred, it is as much a misnomer as if it had used a name by which it never was called." *Cambridge v. York*, 1 Kyd. 256; *R. v. Croke, Cowper*, 26.—In the latter case it appears that power was given to the mayor, aldermen, and commons in common council assembled, to treat for the purchase of lands. The quarter sessions made an order, which is stated to be on application of the mayor and commonalty and citizens. Lord Mansfield said, "This is a special authority delegated by act of parliament to particular per-

sons to take away a man's property and estate against his will; therefore it must be strictly pursued, and it must appear to be so on the face of the order." Lord Mansfield further observes, "Now there are two distinct things—that is, the mayor, aldermen, and commons in *common council assembled*, and the mayor, commonalty, and citizens; the one is a select body, and the other the corporation at large; and we cannot here go into any fact tending to reconcile such distinction, or to shew that in truth the latter are the proper persons. It seems to me that there was in that case a very substantial difference, because it was only by the select body, and in common council assembled, that the act could be done. In the case of the Mayor and Burgesses of Lymes Regis (10 Co. 122 b), a variance in a bond given to the corporation was held immaterial; and it was held that the name of a corporation in grants and conveyances need not be *idem syllabus seu verbis*: it is sufficient if it be *idem sensu*.

There is a difference between writs, declarations, &c., and obligations and leases; for if the name of a corporation be mistaken in a writ, a new writ may be procured; but if it were fatal, if mistaken in leases and obligations, the benefits of them would be wholly lost, and therefore one ought to be supported and not the other.—Gilbert's C. B. 254; 10 Co. 124, a. n. B. The Mayor of Carlisle v. Blumen & Tyner (8 E. 487) is not in point; for there the corporation was by prescription, and the deed to them was held to be evidence that they went by the corporate name in the deed, at least as against the grantor. Knight v. The Mayor, Masters, and Burgesses of Wells—Judgment was given for defendants, in debt upon their bond given as The Mayor, Aldermen, and Burgesses of Wells. In Croydon Hospital v. Fairly (6 Taunt. 467), the corporation by whom the conveyance was made was "The Wardein and Poore of the Hospital of the Holie Trinitie in Croydon, of the foundation of John Whitegift, Archbishop of Canterbury." They made a deed by the corporate name, leaving out the words "of the foundation, &c." The deed was held valid, and the authority of a class of cases from the reign of

Edward VI. to the latter part of James I., which favor great strictness in giving the names of corporations, are denied to be law. The spirit of the decisions (says Mr. Serjeant Best, in argument), is that there must be a material deviation or ambiguity; as, for instance, where there are two corporations, and it cannot be known which of them it is. But this corporation, he says, is sufficiently designated by the account of the name that is given. The court agree in questioning the authority of the class of cases referred to; and, unless the misnomer occasions real ambiguity, the deed made by a corporation by a wrong name is not void. In the case of *The Attorney General v. Rye*, a devise to "the Mayor, Jurats, &c., of the Town Council of the ancient Town of Rye," was held good, though the true name was "The Mayor, Jurats, and Commonalty of the ancient Town of Rye." In *Doe Malden v. Miller* (1 B. & Al. 669) the demise was laid to be by the Mayor, Burgesses, &c., of the borough town of Malden. The name in the charter of incorporation was, The Mayor, Burgesses, &c., of Malden. It was held that this was no variance, it appearing that Malden was a borough town. I do not find any very recent cases on this question, and it would be in vain for me to attempt to reconcile the ancient decisions. It seems to me that the question is reduced to this point: Is there any ambiguity produced by the misnomer? The word 'warden' is introduced into the name, but we have the act before us which makes the warden a constituent part of the council described. The word 'county' is repeated twice, but this creates no ambiguity. The word 'municipal' is left out of the name, but there is enough of the name given to shew that the council of those united counties is a municipal council. The statute directs that the powers of the corporation shall be exercised by, through, and in the name of "the municipal council of such county." The object of the act in giving specific names to the respective councils created thereby in the townships, villages, towns, cities, and counties, is obvious. It is to prevent confusion and ambiguity in the naming so many bodies, each of them councils, were the names left to legal inference; but there

can be no such ambiguity arise from the name here adopted. It is substantially the name given by the statute ; and, though the statute seems to require the use of a name in the exercise of the corporate powers, and though in the exercise of a power of taxation the council ought to pursue the statute strictly, yet it seems to me that such strictness should not be carried to the unreasonable length of requiring that every letter, syllable, and word of the name used in the by-law should be the same as in the act ; and in the absence of any modern authority more against the present by-law than those I have cited, I am inclined to hold the by-law good notwithstanding this objection.

Rules discharged with costs.

DOE CUTHBERTSON V. MCGILLIS.

Realty—Discontinuance—Absence abroad.

In 1822, the defendant, being in possession of the whole, conveyed part of a lot of land to the lessor of the plaintiff, who resided out of, and was not at the time of the execution of the conveyance in, the province of Upper Canada. The lessor of the plaintiff made no entry on the land, nor did the defendant, by any specific act, deliver or relinquish possession, but ceased to exercise any acts of ownership over, and did not occupy the part conveyed. The lessor of the plaintiff was in the province of Upper Canada in 1823, and again in 1824, for a few days each time ; after that period the defendant resumed possession of the land conveyed.

Held, That possession in the lessor of the plaintiff followed the conveyance of the estate, and that such constructive possession will be presumed to continue until proof of actual entry by a stranger, or of discontinuance by some distinct act evincing intention so to do : That absence from the province, and the want of actual occupation for upwards of twenty years by the lessor of the plaintiff, is not a discontinuance of possession within the 17th sec. of 4th Wm. IV. ch. 1 : And that the lessor of the plaintiff was not barred by the Statute of Limitations.

This is an action of ejectment for the south half of the east half of lot No. 124, south side of middle branch river Aux Raisin, Cornwall, tried before Mr. Justice Draper, at the assizes for the united counties of Stormont, Dundas, and Glengarry. Demise laid the 1st June, 1848.

It appeared in evidence, that previous to and in the year 1822, the defendant was in possession of the east half of the aforesaid lot No. 24, claiming to own it in fee ; that he resided in a house on the adjacent lot No. 23, and had improved upon the north half of the east half of No. 24 ; that by indenture of bargain and sale dated the 30th March, 1822, he conveyed the south half of the said east half to the lessor

of the plaintiff and Alexander McPherson as (quære) joint tenants; that at that period, the principal part of the tract conveyed was uncultivated woodland; but there was evidence that six or eight acres had been before that time cleared and fence: that McPherson and Cuthbertson at that time resided in Montreal out of the then province of Upper Canada: that they did not enter or take actual possession of the quarter of lot No. 24 so conveyed to them, nor did the defendant, by any specific act proved, relinquish or deliver up the possession thereof: that in 1823, the lessor of the plaintiff was seen at the town of Cornwall, and that in 1823 or 1824 both he and McPherson (who were partners in trade) were at Martintown in the township of Charlottsburg, which adjoins the township of Cornwall, upon business and remained there for a day or two. There was no other evidence of either of them having been in Upper Canada since the execution of the deed. That on the 7th November, 1834, McPherson conveyed by deed to the lessor of the plaintiff all his estate and interest in the premises for which this action is brought: that since the year 1824, and both beyond and within the period of twenty years next before this action was brought, the defendant had exercised acts of enjoyment upon the premises, which were relied upon at the trial as evincing continued and uninterrupted possession from the execution of the deed of 1822. It was given in evidence that he had occupied the premises (speaking of the whole east half of lot 24) upwards of thirty years; that part of the south half of the said east half is swamp, and that defendant got his wood off another part of it: that wood had been cut thereon, and that oats were cut on the cultivated portion of it upwards of nineteen years ago: that a fence had been run through the woods between that and the adjoining lot eighteen or nineteen years ago, and that defendant's cattle had been pastured in the premises more than twenty years ago; but the south half is not fenced off or otherwise divided from the north half of the half lot, and it does not clearly appear whether the defendant exercised any acts of ownership or possession on any, and if any, on what part

or parts of the south half between the execution of the deed of 1822 and the plaintiff's visit to Upper Canada in 1823 or 1824, or before the years 1830 and 1831. On the evidence, two questions were raised by defendant's counsel—1st. Whether the defendant had retained and continued in possession from the execution of the deed of 1822 until the present time. 2nd. Whether the plaintiff and McPherson had been resident without the jurisdiction of the courts of Upper Canada throughout that period, so as to entitle them to the benefit of the exception contained in the Statute of Limitations. The learned judge held that the defendant's possession embraced in construction of law the wood land as well as the cleared tract of the south half in question, and that he had continued possession thereof; and left it to the jury to find for the defendant if satisfied that the lessor of the plaintiff and McPherson had been at Martintown in the transaction of their business after the execution of the deed of 1822, and more than twenty years before this action was brought, with leave to the plaintiff to move to enter a verdict for himself if the court should be of opinion upon the whole evidence and the finding that he should recover. The jury found for the defendant.

In Easter Term following the *Solicitor General* obtained a rule calling on the defendant to shew cause why such verdict should not be set aside, or a verdict be entered for the plaintiff, pursuant to the leave reserved, or a new trial had between the parties, on the ground that the verdict was against law and evidence and for misdirection.

Vankoughnet, Q. C., shewed cause during the same term, and submitted that the questions were—first, whether defendant was possessed of the south half of the east half of the lot; and if so, second, whether the plaintiff was under disability as being resident out of the province. He contended that it should have been left to the jury to say whether the defendant was in possession in 1822 and continued so possessed; and if so, whether the lessor of the plaintiff knew it, which was not done; wherefore a verdict cannot be entered for plaintiff.—*McLean v. Fish*, 5 U. C. Q. B. R.

That the proviso to section 17 of 4 Wm. IV. ch. 1, only applies to cases where the owner had never taken actual possession; but that in this case the defendant was in possession as owner; and the lessor of the plaintiff must have known it, and has treated him as in possession by bringing this action; that it was not clearly proved that he was out of the province when the defendant's deed was made, and at all events he afterwards visited it, from which period (and it exceeded twenty years), the present Statute of Limitations operated—Doe ex dem. Roylance v. Lightfoot, 8 M. & W. 533.

The Solicitor General, in reply, contended that when the defendant conveyed to plaintiff, the possession passed by virtue of the Statute of Uses, and that the defendant was not afterwards possessed until he re-entered, of which (being wood land) there was no proof relating to a period exceeding twenty years before this ejectment was brought.

Doe ex dem. Macdonell v. Radcliff, 7 U. C. R. 321—That it is not shewn defendant afterwards continued to exercise acts of ownership.

Chopeley v. Macdonell, Q. B. U. C. E. T. 6 V. ; Doe Hill v. Gordon, 1 U. C. Q. B. R. 3—That had defendant brought an action of trespass *quære clausum fregit* in 1824, the evidence would not support it under a plea of not possessed; that the deed transferred possession constructively, and the defendant cannot be presumed to have continued tortiously, and there is no express proof of the fact.

That as to the small clearing on the south half of east half, the defendant thought it was upon the north half of the east half; and that even if he continued to possess and cultivate that tract by mistake, it would not prove or warrant the inference that he remained in or resumed possession of the whole tract contrary to his deed to the lessor of plaintiff, and at the risk of being made responsible to actions of ejectment and mesne profits as a wrong doer and trespasser: that without proof or knowledge on the part of the lessor of the plaintiff, the case was within the proviso to sec. 17 at any rate, and the action not outlawed; were it not so, the owners of all vacant land not within the

proviso to section 17, would, at the end of twenty years after being seized in fee thereof, under deeds operating without livery (as of bargain and sale), be liable to lose their estates by the tortious entry of any stranger entering adversely after the expiration of that period, unless an actual entry or possession within twenty years, (though no one else had entered upon the premises) could be proved. By a deed of bargain and sale, the purchaser became possessed (not only entitled to possession) for all the purposes of seizin, unless the vendor or some other person continue in or afterwards usurp the possession. This effect of the Statute of Uses, is the foundation of the modern conveyance by lease and release.

MACAULAY, C. J.—In Cornish on Uses, 120, I find it stated that under a seizin acquired through the medium of the Statute of Uses, a new conveyance may be made and a new use arise. Thus, one who has the legal estate under the statute, may convey to uses which will be executed. This is of no ordinary occurrence. The same observation may be emphatically made of Upper Canada. Again, at page 131, speaking of a bargain and sale in fee—as, where a conveyance is made to A. and his heirs to the use of B. and his heirs, B. is absolute owner immediately on completion of the conveyance, and may raise a new seizin, &c., as stated at page 120. And that were A. to enter upon B. he would be a disseizor, B. has not, as was formerly supposed, a mere civil but an actual seizin; and, in short, the estate of A. has ceased, and that of B. is completed by the assurance without even an entry by B., to all purposes whatsoever, except that to bring an action of trespass he must make an actual entry; as must, by parity of reason, a bargainee or covenantee.—Butcher v. Butcher, 7 B. & C. 399; 1 M. & R. 220.—See cases cited in Johnston v. Odell.

That a bargainee in fee can bring ejectment against a bargainor if he remains in possession is clear, and shews that the action of trespass *quare clausum fregit*, is in this respect different from ejectment; in the latter entry is admitted under the consent rule; in the former, actual pos-

session must (if denied) be proved.—Harper v. Charlesworth, 4 B & C. 592.

In Plow. P. 422, it is said *arguendo*, if a man seized of land makes a lease for years, then, before the lessee has entered or the lessor has waived the possession, the lessee has but an *interessi termini*. Again that debt for rent did not lie, because the lessee had not entered nor the lessors waived possession, until which entry or waiver made they shall be adjudged occupiers, in which case they shall not have rent.—2 Brownl. 159; 2 Roll. Ab. 174, 407; 1 Roll. Ab. 605, (40), (6). Vin. Ab. Reversion B. (3); 1 Stephen's Com. 344; Dyer 46, Pl. 3. If the lessor waives possession, though the lessee do not enter, debt lies upon the contract.—1 Salk. 209; 1 Lord Ray. 171 Luter, 213, 444. Before entry of lessee there is no reversion at common law.—1 Saund. 203; Cro. El. 262; 1 Sal. 209; Com. Dig. Pl. 2, W. 14; Co. Lit. 271, b (note 1).

A. seized in fee made a bargain and sale for three years; here is a reversion in the vendor before entry of the vendee.—Milton v. Lutwick, Jo. 9. pl. 7; Woodfall, 171; Croke El. 46; 8 East. 493; Croke Car 110.

Sixth point, where one by indenture, in consideration of money, bargaineth and selleth, demiseth and granteth lands for years, and the next day after by indenture reciting that grant and demise, grants the reversion to divers uses, the lessee allowing, it is a good grant of the reversion, although there was not any proof that the bargainee entered before this grant of the reversion, or that the bargainor waived the possession, for the lessor shall be adjudged in actual possession by the stat. of 27 H. VIII. of Uses, and the reversion is immediately divided from the possession, and he hath a good reversion.—1 Saund. 241, (1), (2); 1 Saund. 234; 1 Stephen's Com. 49, 43; 1 T. R. 384-5; Co. Lit. 309; 6 Co. 68; Cro. J. 192.

Tew v. Jones, 13 M. & W. 12—A vendor having conveyed and continuing in possession, is not liable to the vendee for use and occupation, because he remains in adversely, and does not (without more) hold by the permission of the vendee. He is a wrong doer, and may be turned

out by ejectment, and is liable in trespass for mesne profits.—*Browne v. Notley*, 3 Ex. R. 219. Where the interest of a tenant is determined by the death of a tenant for life, under whom he holds, the possession ceases with the interest if he is not in actual possession and occupation; and he cannot maintain trespass unless he does some act indicating an intention to continue in possession. Parke, B.—The question was whether, after his interest ceased, he could be presumed to be in possession, and if he continued in possession after that time he would be a wrong doer, and therefore must be presumed not to have continued in possession, unless an intention to the contrary be clearly shewn; and, though there was nothing to indicate the giving up possession, there was no evidence of an intention to remain, so that the possession was in a neutral state. He must therefore be considered to have been out of possession, for if not he would be liable to an action of trespass, or to an action on the implied contract to deliver up possession at the end of the term. Unless some act be done indicating an intention to the contrary, possession ceases as soon as the interest. Rolfe, B.—Unless he did some act to the contrary, it could not be said he held possession when it was his duty to give up possession but he did nothing. In the note to the American edition it is said that the principle of the case seems to be that possession follows the title, unless there be an actual adverse occupancy.—*Barker v. Keat*, 2 Mod. 250; 2 Vent. 35 S. C.; 5 Co. 113, 124; *Lewis v. Lewis*, 4 W. & S. 328; *Proprietors v. Call*, 1 Mass. 48; *Rex v. Mayor of London*, 4 T. R. 26. Lord Kenyon, C. J.: “Where there is no actual possession in another person the possession follows the property.”

1 C. M. & R. 861; 1 Gale, 48—all combine to shew that in the absence of proof to the contrary, the presumption is, that the statute for transferring uses into possession did in this case transfer the possession to the use, and that the possession so remained until distinctly proved to have been afterwards usurped by the wrongful entry of the defendant. It must *prima facie* be intended that, as the statute constructively transferred possession to the lessor of

plaintiff on the one hand, so the defendant in point of fact waived or discontinued actual possession on the other. It is not like a vendor occupying a house or visibly or plainly in possession at the time and after the execution of the deed of conveyance. The possession was in a neutral state and the cases in the books will be found distinguishable from the present in this important respect. Actual possession is a matter of fact and not to be presumed or inferred contrary to the party's deed; and to make him a wrongdoer, it must be proved. Any presumption must be in favor of the defendant's relinquishment, and the lessor of the plaintiff's investiture by operation of law under the Statute of Uses.—5 Bing. 440; *Coe v. Clay*, 9 M. & P. 57; 1 Tyr. 302; 1 Star. N. P. C. 12; 1 C. & J. 391; *Clarke v. Serricks*. 2 U. C. Q. B. R. 535.

4 Wm. IV. ch. 1, sec. 17.—The right to make an entry or bring an action to recover any land, where the person claiming such land shall claim in respect of an estate or interest in possession granted or otherwise assured by any instrument other than a will to him by a person being in respect of the same estate or interest in the possession of the land, and no person entitled under such instrument shall have been in possession or receipt of the profits of the land, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid became entitled to such possession or receipt by virtue of such instrument.

Sec. 27 reserves five years in case of non-adverse possession.

Sec. 28 relates to persons under disability, such as residents abroad, &c.

Sec. 17, proviso, relates to possession taken of uncultivated land without the knowledge of the owner.

I do not think the case can be treated as within this proviso; and if the defendant was in actual adverse possession when the lessor of the plaintiff visited Upper Canada in 1823 and 1824, the cases are strong to shew that the Statute of Limitations would have commenced running (*Gregory v. Hurrill*, 1 Bing. 324; 8 Moor, 189, as

to which see 5 B. & C. 344, S. C. in Error); but the defendant was not in adverse possession at that time, as the law then stood, even if he had clearly continued in possession. I suppose, however, the statute 4 Wm. IV. ch. 1, would operate retrospectively to render such possession constructively adverse under that act, although it was not adverse as under the statute of James. There is, however, this inconsistency in such a view, that while the late act 4 Wm. IV. ch. 1, sec. 28, saves the rights of persons absent from the province, when they are absent at the time the right to make entry first accrues under that statute, it operates retrospectively against absentees, lunatics, *feme covert*s, &c., by reason of their having ever been in a situation to be affected by this act, though not so at the time it was passed, and although the former statute was not running against them, and they were in relation to that act under the same disability that is protected by the 4 Wm. IV. ch. 1, sec. 28 (see 2 Bing. N. S. 215). I have hesitated in considering whether the late act was intended to apply retrospectively to such cases; but, as I can find here no defined line drawn on this head between residents and non-residents, sane or insane, or women married or single, I am disposed to think, if the party was present, sane or unmarried, when the right to enter first accrued under the provisions of this statute, although absent, insane or under coverture when it came into operation, and although the former statute, by reason of the possession not being adverse, had not begun to run against them while so present sane or unmarried, the late act must be construed to operate against them, as it does against all others not under any such disability, and who were allowed (section 27) five years from the passing of the act to make entry where the possession had not been previously adverse, but was virtually declared as rendered adverse by that statute. It is however not necessary to express an opinion on this point in any view of the present case, for it appears to me that the lessor of the plaintiff acquired not only a right to enter but a constructive possession by operation of law under the Statute of Uses, upon the execution of the defen-

dant's conveyance to him, and that such possession must be proved to have continued until after he had last departed from Upper Canada, if not until within a period less than twenty years before the commencement of this action ; and if so, that under such circumstances, he is within the saving or protection afforded by the 28th sec., although it in terms mentions only absentees at the time the right of entry first accrued, because, if the plaintiff is to be regarded as possessed by force of the Statute of Uses, his right to enter would first accrue under sec. 17, not upon the execution of the defendant's deed of bargain and sale, but upon his being afterwards dispossessed by reason of the defendant's subsequent wrongful entry and unequivocal acts of resumed possession, and which are not shewn to have occurred until after the year 1824, when the plaintiff was last proved to have been in Upper Canada.

I do not think the plaintiff discontinued possession more than twenty years before this action was brought, within the meaning of the 17th sec. His is not like the case of one having actually occupied, deserting or abandoning the premises without the *animus revertendi*, like a tenant when time has expired, or a mere trespasser or squatter without title going off and relinquishing possession ; but his is like the case of a government grantee or a purchaser of uncultivated lands not in actual occupation, and whose constructive possession derived under the government patent or deed of conveyance is presumed to continue until it is proved to have been disturbed or put an end to by the actual entry of a stranger, or by his discontinuing such possession by some overt or distinct act evincing the intention so to do, as might well be said of any such person conveying such lands to another by indenture of bargain and sale under the Statute of Uses, whence it would follow, not that the lessor of plaintiff had discontinued possession, but that the defendant had.

McLEAN, J.—It has been decided that the issuing of a patent to any individual not only gives to such individual a right to enter upon the land contained in it, but that it gives such a possession to the patentee as will entitle him

to maintain trespass without any actual entry if no other person is in actual occupation ; and the execution of a deed by a party in possession must be considered, under the Statute of Uses, not only to convey the land but possession also to a purchaser, unless where there may be an actual visible occupation of the premises by the grantor or some one else, after the execution of his deed. In this case, the defendant assigned a part of the premises in his possession, consisting principally of wild land, by his deed of 1822, the small portion of cleared land upon it not being then or at any time since divided from the cleared land on the north half of the premises, which the defendant retained. The deed to lessor of plaintiff and McPherson transferred the possession of the premises contained in it to the grantees, who could at any time after, I think, have maintained trespass against a wrong doer for any injury to the premises. If, then, I am correct in considering the possession transferred to McPherson and Cuthbertson, they must have been in possession in 1823 and 1824, when they visited Martintown on business. It is not shewn that they were in Upper Canada after that period, or at any time after the defendant did anything on the premises indicating on his part an intention to take or hold possession. By the testimony of one witness, a near neighbor, it is shewn that the defendant's cattle pastured on the premises for more than twenty years ; but the fact of defendant's cattle going on the premises to feed, which were not separated from the defendant's own premises adjoining, can scarcely be regarded as any evidence of possession by the defendant ; and though this witness stated that defendant got his wood off another part of the premises in dispute, he does not say at what period he took the wood ; nor, if he did, should I be disposed to look upon such an act of trespass as any evidence of actual *bonâ fide* possession taken.

There was nothing, as it appears to me, indicating an intention on the part of the defendant to take possession and to treat the land as if it were his own till 1831, when, according to the testimony of a witness, oats were cut on the premises ; but even this fact was not very clearly proved,

as the witness could only judge of the oats being on the south half by the eye and the appearance of the premises. Admitting, however, that the witness was correct, and that he cut oats on the premises claimed by plaintiff in 1831, and wood also in the fall of that year, still, all that was within twenty years; and if the plaintiff had been in the province during the whole period, he would not be barred from maintaining this action by such act of occupation on the part of the defendant. It is not necessary to decide under the statute 4 William IV. ch. 1, sec. 17; the lessor of plaintiff is at all events entitled to recover the wild or wood lands, inasmuch as defendant has failed, as it appears to me, to prove any actual possession on his part, held while the lessor of plaintiff or McPherson were in the province, and thence continued for a period of twenty years, so as to bar the plaintiff's right to recover the whole premises. In the case of *Brown v. Notley*, 3 Ex. R. 219, the principle seems to be established to which I have adverted, that possession follows the title, unless there be an actual adverse occupancy; and in the case of *Doe McDonald v. Rattray*, 7 U. C. Rep. Q. B. 321, it was held, that where a party had permission to occupy one half of a lot, and he cut wood on the other half and remained in possession for more than twenty years on the half on which his house was, and which he cultivated, the act of trespassing for wood on the south half could not be regarded as an assertion of possession. On these grounds, therefore, I am of opinion that the direction of the learned judge who tried the cause was wrong, and that the lessor of plaintiff, being entitled to recover, the verdict for defendant must be set aside, and a verdict for plaintiff entered.

SULLIVAN, J.—The questions raised in this case have been argued with great ability on both sides, and possess much interest. The lessor of the plaintiff is one of two purchasers of the land claimed, by deed of bargain and sale made in the year 1822. The defendant in this action was the vendor, the premises consist of the south half of the east half of a lot of land, at the time of the conveyance the defendant was in possession of the whole half lot

that is to say, he lived on land adjoining, and some clearing had been made upon the premises conveyed. At the time of the conveyance the lessor of the plaintiff and his co-purchaser were residing out of Upper Canada, and did not by themselves or their agents take visible possession of or make actual entry upon the part conveyed. No acts of ownership are proved on the part of either the defendant or the purchasers between the time of the conveyance and the year 1831, at which latter period the defendant's servant is shewn to have done some work upon the premises. The purchasers are proved to have been in Upper Canada on two occasions since the making of the deed, and before the year 1831; and they are said to have transacted business at these times. but they are not shewn to have been upon or near the land, and their presence appears to have been casual and temporary. The other purchaser conveyed his portion to the lessor of the plaintiff, who now claims the whole premises sought to be recovered.

On the part of the defendant it is argued, that as he was in possession of the whole half lot at the time of the conveyance, and as the purchasers made no entry, and as he, the defendant, is not proved to have actually gone out of possession, that his possession of the whole half lot continued the same as before the deed; that therefore, from the moment of the execution of the deed by him, the purchasers had a right of entry upon him: that, saving the proviso in favor of absentees, the limitation of the statute of 1834 began to run: that the effect of this proviso in favor of absentees was at an end upon the first visit of the purchasers to Upper Canada more than twenty years before this action was brought; and therefore that the right of entry or action by the lessor of the plaintiff is barred by the statute.

In favor of the lessor of the plaintiff it was argued, that as only a portion of the premises are shewn to have been cleared, and as he and his co-purchaser are not shewn to have had knowledge while entitled to the land of the same being in the possession of any one, he was therefore entitled to the saving provided in the 17th section of the act

of 1834, in respect to the portion of the premises remaining in a state of nature: that moreover, the casual visits of the owners of the land to Upper Canada did not constitute such a presence as would take the case out of the proviso in favor of absentees. And as the defendant was not residing on the premises in question and was not shewn to have exercised acts of ownership upon them from the time of the conveyance till the year 1831, that he must be presumed to have abandoned the possession when he made the deed; and not having resumed it till 1831, that it was then the right of action or entry accrued to the lessor of the plaintiff and his co-purchaser, at which time they were both absent from the province, and then and ever since entitled to the proviso in the 28th section of the act of 1834.

As regards the point raised upon the construction of the 17th sec.—the proviso is as follows: “Provided always, that until the person deriving title to land in this province, as the grantee of the crown or his heirs or assigns, or some one of them, shall have taken actual possession of the land granted by residing thereupon, or by cultivating some portion thereof, the lapse of twenty years shall not bar the right of such grantee or any person claiming by, through, or under him, to bring an action for the recovery of such lands, unless it can be shewn that such grantee, &c., while entitled to the land, had knowledge of the same being in the actual possession of some other person not claiming to hold by him or under the grantee of the crown (such possession having been taken while the lot was in a state of nature), in which case the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained.” The words “land granted” used in the statute seem to me to have reference to the whole of the land granted by one patent, and an occupation of any portion of such land, to the knowledge of an owner, takes the whole out of the proviso, even though he should not be the owner of the part occupied. This probably would be too wide a construction to give the language of the act, if it were applied to a grant from the crown of more than one lot of land—the lots not being contiguous. The word

“lot” used in the proviso may be held to confine its meaning to what is technically understood in this country as a lot. But in this case I think there can be no doubt, for the whole land of the defendant was but a half lot. He occupied a portion of it, and cultivated it before selling the portion claimed by the lessor of the plaintiff, and even a part of that portion is proved to have been cleared by him. I think, therefore that the whole is taken out of the proviso, which cannot, with any show of reason, be taken to apply distributively to every acre or rood of land in a lot so as to save the statute as to the parts remaining in a state of nature.

Then, supposing the lessor of the plaintiff and his co-purchaser had a right of entry upon the defendant, the limitation of the statute being prevented from running only because of the absence from Upper Canada of the owners, would such a presence as was proved in this case cause the statute to begin to run? In the case of *Gregory v. Hurrill* (1 Bing. 324), on a reference from the Court of Chancery, the Court of Common Pleas certified a debt not to be barred by the lapse of more than six years, though the debtor had, more than six years before the striking a docket against him in bankruptcy, landed from a ship at Deal, and had waited there several days for a passage. In the argument of this case, the case of *The King v. The Justices of Staffordshire* (3 E. 151) was cited, to shew that the court could not import “notice” into a statute for the purpose of extending the time of appealing from an order of justices—the appeal being given to the next quarter sessions after the order made; and, though the appellants had no notice of the order, they were held too late. The same case of *Gregory v. Hurrill* was referred to again several years afterwards by the Court of Chancery to the Queen’s Bench, and that court certified that there was *not* a valid debt to support the commission, thus overruling the Common Pleas. The instance is put in the argument of a person having a right of entry binding in England, and departing without learning the fact that he had such right; and it is asked would he be barred in consequence of such

landing. The decision of the court seems to answer this question in the affirmative. Indeed, the case of a plaintiff landing or casually coming into the country would seem to me much more decidedly to set the statute running than the casual coming of a defendant; for, in the former case, the plaintiff has the opportunity, if he please to remain, of asserting his rights; whereas in the latter, the plaintiff or creditor, unless he have knowledge of his debtor's presence, is absolutely given no opportunity. I think the presence of the purchasers in this case as proved sufficient to set the statute running, especially as it is shewn that they transacted business in Upper Canada when present there, though their presence was but for a short season. It is another and more difficult question, whether, at the time of their presence or before that time, they had any right of entry or action as against the defendant or any other person in respect of the premises; for, unless there was an existing right of entry at the time of their presence or at least before that time there was nothing to be barred by the statute.

The statute 4 Wm. IV. ch. 1, contains in sec. 16 the limitation clause in question. The words are: "No person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims; then within twenty years next after the time at which the right to make such entry or distress or to bring such action, first accrued to the person bringing the same."

What is meant then by the right to make such entry? This is a question of construction on which I have felt some embarrassment. In the common acceptance of the term every man has a right of entry into his own premises from the accruing of his title. When he is in possession he enters and re-enters at his pleasure; but the statute does not begin to run from the first accruing of such a right. This then is not the right of entry contemplated by

the statute. It must therefore be a right of entry as contradistinguished from possession.

It is perfectly plain that there can be no right of action without a defendant, or right of distress for rent without a tenant. It is true that an ejectment may be brought as upon a vacant possession, but then this is only necessary when some person has been and is in constructive possession contrary to the right, and when it is desired to have judgment on the title. I think in like manner there can be no right of entry in contra-distinction to the possession, unless there be a person in possession, actually or by legal construction, upon whose wrongful possession the entry is to be made.

The 17th section of the act is in some measure explanatory of this, for it enacts that the right of making entry or distress and of bringing action shall be deemed to have first accrued when the person claiming such land or rent, or some person through whom he claims, shall, in respect, of the estate or interest claimed, have been in possession or in receipt of the profits of such land, and shall while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance, or at the last time at which any profits or rent were so received. The difficulty arises in the construction of the words—discontinue the possession. Is the mere absence from land, no one else being in possession, a discontinuance of possession? and is the discontinuance of receipt of profits to be held to apply to cases where there are no rents and no profits accruing.

The same section proceeds to explain, “And when the person claiming such land shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

The same section explains in the same manner the time

of the accruing of the right in the case of a purchaser from a person in possession or in receipt of the profits, and the right is said to accrue from the time the purchaser became entitled to such possession or receipt by virtue of such instrument.

The like explanation is given in cases of future estates and of forfeitures—namely, the right is said to accrue upon the estate becoming possessory, or upon the forfeiture.

The question then arises, do these rights then accrue when there is no person in possession? for example, in the case of a claim under a deceased person, does the statute mean to apply to cases where some person other than the rightful claimant has the possession from the death of the former rightful possessor; or does it apply to cases, also, where the former rightful possessor (as in many cases in this country) died, leaving the possession vacant; or, in case of alienation do these rights accrue only where the grantor or vendor continues in possession, notwithstanding the conveyance, or when some other person than the purchaser has the possession? or, do the rights accrue also, where the vendor, in accordance with the conveyance, abandons the possession, and it is left vacant? or, in the case of future estates or forfeitures, do their rights of action, distress or entry accrue only on the estate becoming possessory, in case some person not having the right is in possession? or, do they likewise accrue when the possession is vacant, and where there is no one upon whose possession to make an entry, no defendant against whom to bring an action, no tenant upon whom to make a distress?

The 22nd section of the act provides that no person shall be deemed to have been in possession of land within the meaning of this act merely by reason of having made an entry thereon.

The 23rd—That no continual or other claim upon or near land shall preserve any right of making an entry or distress or of bringing an action.

Do these 22nd and 23rd sections then mean to apply only to cases where some person is in possession upon whom the unavailing entry is made, he not being evicted; or, in

other words, to cases of claim when some person is in possession other than the claimant? Or, do they apply also to cases where no one is in actual possession upon whom to make an entry or claim; or, in other words, must every purchaser of land actually and continually, either by himself or his tenants, occupy it to preserve his title? Or, if a person be absent from his land, it being unoccupied for twenty years, is that land the property of the first wrong doer who takes possession, even though the owner had every year or every month entered on his land claiming it as his own.

My opinion on the construction of this act has always been that it supposes some person or other than the rightful owner in possession or in receipt of profits inconsistently with the real title; that there is no dispossession, discontinuance of possession, discontinuance of receipt of the rents and profits, no entry or claim, such as is contemplated by the 22nd and 23rd sections, until some one has commenced a possession or receipt incompatible with the true title. The act does away with the old distinctions regarding adverse possessions, for it makes all possessions adverse not shewn to be otherwise by actual demise, acknowledgment or entry, distress, or payment of rent; but still there is contemplated a possession or receipt of profits at common law, or by the statute, inconsistent with the true title, against which the right of entry or action accrues. In the absence of such possession or receipt incompatible with the true title, the action does not, I think, accrue with the title, but waits the occurrence of the inconsistent possession or receipt of profits.

And so runs the 21st section of the act, as regards wrongful receipt of rent by a person claiming against the true title, the right of action after the determination of the lease is explained to first accrue upon the wrongful receipt of the rent.

The case of *Doe Corbyn v. Brunstone*, 3 Ad. & El. 63), has the appearance of being contrary to my opinion. In that case, it appeared that a person named Whitwell was seized in fee, and died so in 1774, having devised the pre-

mises in fee to his wife, who, on his death, took possession. She married the father of the lessor of the plaintiff. The widow had continued in possession of the premises from the death of her first husband to the time of the second marriage, and she and her husband continued in possession for some years after the marriage. It appeared they afterwards removed to London, and subsequently to St. Albans, where they both died, the wife in 1828, the husband in 1832. No act of ownership or occupation was proved to have been done by them after their removing to London, which was clearly more than forty years before the commencement of the action. Littledale, J., held the claim barred by the statute 3 & 4 Wm. IV. ch. 27, sec. 17, similar to the provincial act of 1834, and nonsuited the plaintiff, with leave to move to set the nonsuit aside. Such is the statement of the case in 3rd Ad. & El., which does not differ from the report of the same case in 4 N. & M. 664, The nonsuit was sustained by the court. The fact does not appear whether or not at the time of the parents of the lessor of the plaintiff leaving the possession any other person was left in possession or took possession; but from the argument of counsel in moving for the rule to set aside the nonsuit, where he attempts to shew that in 1835 the possession of the defendant was not adverse, and from the judgment of Lord Denman, in which he says, "If the persons actually in possession could be shewn to have held under him through whom the plaintiff claims, the possessor of the former—that is, of the persons actually in possession—might be regarded as the possessor of the latter;" and from the strong improbability that any premises in England would be left and continue without some person in possession or in receipt of the rents and profits, it appears to me that the counsel and the court took it for granted that either the defendant or the persons under whom he claimed, or at all events some persons, were in possession for the period of forty years next before action brought. There was no argument or decision upon the point now in question, and it appears to me very unlikely to arise in England, though in this country the quantity of unoccupied

land may make it of frequent occurrence. I cannot draw from this case the conclusion that a mere leaving premises by the rightful owner, no person being in possession or coming into possession, is such a discontinuance of possession as would reduce the owner's title to a right of entry, or cause an action to accrue, when there was no one against whom it could accrue.

The stat. 21 Jac. I. ch. 16, enacted, that no person shall make any entry into any lands, tenements, or hereditaments but within twenty years next after his or her right or title shall first descend or accrue to the same, except infants, &c. The effect of this statute, which after all is very like the statute of 3 & 4 Wm. IV. without its definitions and explanations, is shortly stated in Smith's note, to *Nepean v. Doe* (2 Smith's Leading Cases, 396): "Previous to this," he says, "the claimant might have entered at any time, provided that his entry is not tolled.—(*Bovell's case*, Co. 11, 6.) But this statute in twenty years barred the disseisor's entry, in the same way that a descent cast barred it at common law; and the right owner was, after that, put to his real action. The statute, however, it is apprehended, only runs against the true owner in those cases in which he would at common law have been put out of his tenancy and reduced to his right of entry, but not to cases where he might have elected to consider himself disseised, although not really so, for the purpose of entitling himself to maintain an assize; and consequently, whenever the question arose whether a particular claimant was barred by having been twenty years out of possession, the mode of solving the question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a right of entry; for if he had, then, as that right of entry would be barred by stat. 21, Jac. I., at the end of twenty years, the possession during the intermediate term, was adverse to him. Now, in order to determine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to enquire in what manner the person who had been in possession during that time held. (See

Reiding v. Royston, Salk. 423.) If he held in a character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange itself under some one of the heads disseizin, abatement, definement, or intrusion, all of which expressed at common law different modes of substituting a freeholder by wrong, by one by right, so as to make the new comer tenant to a lord and to a stranger's præcipe—(See 1 Roll. 659, Co. Lit. 377,) it followed that the possession in such a character was adverse. But if it was otherwise, he held in a character incompatible with the claimant's title. And in order to ascertain in what character the person in possession held, the court would look at his conduct while in possession.

This note, fully sustained by the numerous authorities cited, and to which it is not necessary for me to refer, shews one thing very clearly—that is to say, that though the statute 21 Jac. 1., in the same way that the 3rd and 4th Wm. IV., gives the accruing of the plaintiff's title as the time of the accruing of his right of entry, yet it was never held that under it there was a right of entry accrued until a person was in adverse possession. The difference between the two statutes, seems to me, to be as to the doctrine of adverse possession; the latter statute makes all possession but that of the true owner, in effect sufficient to cause a bar by the statute after the lapse of twenty years, unless shewn in the particular modes pointed out by the act to be compatible with the rightful claimant's title; but it does not make the leaving a place vacant to constitute a commencement of the bar; there must still be some one in possession to whose possession the statute would give the effect after the lapse of twenty years of an adverse possession. In short, the true owner, though he has left the visible possession, continues in possession in law; and his possession is not discontinued until there is some other possession incompatible in fact, or which the statute makes incompatible with his for the purpose of causing a limitation of his right. Therefore, no matter what the commencement of his title to the land was or when it arose, his is the case of an estate and of land in

possession ; and it is upon his dispossession or discontinuance caused by another possession, that the statute begins to run.

In the case of *Nepean v. Doe ex dem. Knight* (2 M. & W. 899), Sir W. Follett thus describes the accruing of the right of entry : “ The right of entry accrues to the remainder-man as soon as he has a right to treat the party in possession as a trespasser.” Lord Denman says, in giving judgment, “ We are all clearly of opinion that the 2nd and 3rd sections of the Act 3 and 4 Wm. IV. ch. 27. have done away with the doctrine of non-adverse possession ; and, except in cases falling within the 15th section of the act, the question is, whether twenty years have elapsed whatever be the nature of the possession.

Doe Davy v. Oxenden (7 M. & W. 131) is very strongly in favor of my construction of the act. It is there held that an omission to receive rent from a tenant by agreement for more than twenty years, where there has been no adverse claim or payment of rent to any other person, is no bar to an action of ejectment after the expiration of the term.—*Doe Thompson v. Thompson*, (6 Ad. & El. 725), *Culley v. Doe Taylerson*, (11 Ad. & El. 1008), *Doe Roylance v. Lightfoot*, (8 M. & W. 553), *Doe Bennett v. Turner*, (7 M. & W. 226), *Owen v. Beauvor*, (16 M. & W. 547), and all the other cases I have been able to find in the English authorities, as well after the Statute 3 & 4 Wm. IV. as before, shew a person in possession, and that it is from the time the owner of the land is entitled to treat some person in possession as a wrong doer, the right of entry or action accrues. Indeed, the 27th section of the provincial act, and the 15th of the English act, which provide for cases where the possession is not adverse to the claimant at the time of the passing the act, seem to contemplate a possession in some one other than the claimant having the title. In the Court of Queen’s Bench in this province, *Doe McLean v. Fish*, (5 U. C. R. 295), decides that a mortgagor is in possession of wild land upon which he never entered, but it is upon the ground that there was an express covenant in the mortgage, and that he should remain in possession until default made, after which default, the statute began to run.

The case I have cited, *Doe Roylance v. Lightfoot* (8 M. & W. 553) is nearly in accordance with this case, although it might almost be relied upon to shew that even with such a covenant the right of entry commenced upon the execution of the mortgage, not upon the default. Baron Park seems to think that the covenant would not be a lease. But in that case the mortgagor continued in actual possession. In *Doe Dunlop v. Servis* (5 U. C. R. 284) there were other persons than the plaintiff in adverse possession for more than forty years; so that neither of these cases, nor any reported case that I can find, establish, what I consider an unreasonable doctrine—namely, that the statute begins to run against an owner, the possession being vacant, and no perception of profits existing. Indeed, notwithstanding the covenant on which the opinion of the court is founded, I feel much inclined to doubt the authority of the case *Doe McLean v. Fish*.

My opinion is, that unless the defendant in this case, by legal inference from his possession before the deed of bargain and sale must be held to have continued in possession after that deed, or, unless he has been proved to have continued in actual possession after that time, and more than twenty years before action brought, the lessor of the plaintiff is entitled to recover.

As to his possession continuing by legal inference: the purchasers not having made actual entry, it is necessary to consider the effect of the deed of bargain and sale.

Shepherd's Touch. by Prest. 222.—The effect of this is to transfer the use, and by means of the Statute of Uses the property (namely, the legal estate); and this it will as effectually do as any other kind of conveyance whatever. *Fox's case*, 8 Co. 936.—A demise for 99 years in consideration of money passes the reversion and the rent without attornment. However, the bargainee cannot have the benefit of a condition upon a demand of the rent without giving notice of the bargain and sale to the lessee. The bargain and sale vests the use, and the Statute of Uses the possession. *Cro. Jac.* 696: *Com. Dig.*, Bargain and Sale, B. 3.—Upon a bargain and sale for lands, whereof the

bargainor himself is in possession, and the bargainee never entered, if afterwards the bargainor makes a grant of the reversion, reciting the lease, it is a good conveyance of the reversion, and the estate was vested and executed in the lessee for years by the statute, though not to have trespass without entry and actual possession. Viner's Ab., Deeds G.—The bargainee has actual possession; he may surrender, assign, attorn, and release, but he cannot bring trespass. Viner's Ab., Trespass S. 14.—There is an actual possession in law and an actual possession in fact, as if a man bargains and sells land presently the bargainee hath actual possession, he may surrender, assign, attorn, and release, yet he cannot upon this bring a trespass, and so he hath no actual possession but the actual possession which gives him power to bring an action for the profits. Noy. 73.—He that claims by virtue of the Statute of Uses ought to have actual possession before he can have trespass. See Ford's case, 11 Rep. 41; Plowd. 301.—And in case of a bargain and sale the bargainee is in actual possession (read, hath an actual estate) before any entry, so that the lessee may attain to the grant of the reversion (2nd Prest. Conv. 225, 233); and yet I think he hath not such a possession as to bring any possessory action for trespass or the like before an actual entry. He may maintain an ejectment, but cannot maintain an action for trespass prior to actual possession: for, where the statute 27 H. VIII. of Uses provides (Co. 5, 112,) that the actual possession (meaning seizin or estate) shall be adjudged according to the use, yet it ought to have, as the means of maintaining trespass, a circumstance which is requisite by the common law, viz., an actual entry (read possession) in deed.

In a very late case (*Lichfield v. Ready*, English reports of Law and Equity, 1, 460, 20 Law Journal, N. S. Ex. 51,) Baron Parke says, "Indeed it is common learning that an action of trespass cannot be maintained without entry, so that when there is a conveyance under the Statute of Uses an action of trespass cannot be maintained till entry." In that case, a party having mortgaged his premises in 1846, and being allowed to remain in possession, let them in

1848, to the defendant. In October, 1849, the plaintiff, without having made an entry in the premises or having otherwise been in possession, brought ejectment against the defendant, who gave his consent to a judge's order, dated the 31st October. The order directed proceedings to be stayed till the 15th November then next, the tenant in possession, undertaking on that day, to give up possession to the plaintiff, and that on default, the plaintiff should be at liberty to sign judgment and issue execution. On the 15th of November, the plaintiff first entered into possession, and brought an action for mesne profits accrued between November 25th, 1848, and the 15th of November, 1849, the day upon which he gave up possession. It was held the action was not maintainable: Baron Parke concluding the judgment thus: "The plaintiff had a right to the property in dispute, and the only question is, whether he had possession of the premises at the time of action brought; and I think the bare fact of his being mortgagee is not sufficient. See also *Butcher v. Butcher*. 7 B. & C. 399; *Hey v. Moorham*, 6 Bing. N. C. 52.

The law thus seems clear, that the purchaser by bargain and sale has not possession sufficient to maintain trespass without entry, but he may make entry, according to *Butcher v. Butcher*, in any way sufficient to shew his desire and intention to take possession. And he may maintain ejectment, for the entry confessed in that action makes the bargainor a trespasser; but I should regret to think that this doctrine as to the action of trespass extends to cases of possession actually vacant at the time of the bargain and sale.

In all the cases I have cited, there was an actual possession in the defendant, in the bargainee, tenant, or person claiming under some of them, incompatible with the possession necessary to maintain trespass; but in the cases so frequent in this country, of bargains and sales of estates which neither the bargainor nor the bargainee ever saw, I think it would be going beyond the authority of decided cases, and beyond the law, to say that even trespass would not lie without entry of the bargainee, of vacant land.

Since writing the above, I have read the case of *Brown v. Notley*, 3 Ex. 219, in which the principle I have been contending for, is clearly laid down, which may be summed up as in the American note: "That possession follows the title, unless there be an actual adverse occupancy." In *Brown v. Notley*, the premises happened to be covered with water at the season of the year when the lease expired. Baron Parke says, "The plaintiff had a lease of the land when he took possession. Under that lease, he was in actual possession of the land, and must be presumed to have so continued until the end of his interest, which ceased on the death of the tenant for life in January, 1848. During all the previous time, he was in a condition to maintain trespass, because he entered and occupied the land with his cattle; and having done no act to the contrary, would be considered in possession until the end of his term. The question is, whether, after his interest ceased, he could be presumed to be in possession. Now, if he continued in possession after that time, he would be a wrong doer, and therefore must be presumed not to have continued in possession unless an intention to the contrary be clearly shewn. But, though there was nothing to indicate the giving up possession, there was no evidence of an intention to remain after the term ended, so that the possession was in a neutral state. He must, therefore, be considered to have been out of possession. If not, the consequence would be that he was liable to an action of trespass.

I see no difference between the decision in *Brown v. Notley*, and the opinion at which I have arrived in the case before us. I did not expect to find an English case of vacant, or which Baron Parke calls neutral, possession. If the defendant in the present case did not shew by clear evidence his intention to keep possession contrary to his deed, it is plain that no right of entry or action accrued against him which would set the statute running. It seems to me also that the cases of *Brown v. Notley* upholds the doctrine, that in the case of vacant possession, the bargainee may maintain trespass without actual entry.

At least, this doctrine follows inferentially from the decision, and that it is a very important principle to be established in this way, none of us who are acquainted with the transactions relating to the sale and purchase of land in the lumber districts of this province will be disposed to deny.

I fully concur with the rest of the court in thinking that judgment should be for the lessor of the plaintiff.

KAIN V. MCGILL.

Certificate depriving plaintiff of full costs—22 & 23 Car. II., ch. 9—43 Eliz. ch. 6.

To a declaration in trespass the defendant pleaded not possessed, which was held bad on demurrer, and plaintiff obtained a verdict with 1s. damages. A certificate under the stat. 43 EL., ch. 6, sec. 9, was obtained by defendant after judgment entered and costs taxed, that the damages were under 40s. On motion for revision of taxation of costs,

Held, that the plaintiff was entitled to costs, on the ground that the judge who tried the cause could have had no opportunity of certifying that the title was in question under the plea of not possessed, after its being held bad on demurrer; and that the certificate under the stat. 43 EL. was too late.

Process, 6th November—Declaration, 21st December, 1850—Trespass. 1st count—For that the defendant on the 1st of December, 1848, and at divers days, &c., broke and entered divers closes of plaintiff, being the east half of lot No. 23, in the 6th concession of King, and lot No. 23 in same concession and township, and trod down and crushed the grass and corn of plaintiff of great value then there growing and being, &c., and also tilled said land, and cut down, carried away, and disposed of the crops arising therefrom, and also cut down the grass and corn of plaintiff then growing on the said closes, and then seized, took, and carried away the hay and corn of plaintiff off and from said close and converted, &c., to his own use, &c.

2nd. Assault and Battery.

3rd. Assault and Battery.

4th. De bonis asportatis.

Pleas—1st. Not guilty of any or either of the trespasses alleged, &c. Similiter and issue.

2nd. As to all the alleged trespasses in the declaration mentioned, except as to the gates, &c., that plaintiff was not possessed of the said close in which, &c., or of the grass and herbage thereof, modo et forma.

3. As to the gates, &c., not guilty—to the country, and similiter.

Demurrer to 2nd plea—Venire to try the issues. Judgment was given for the plaintiff on the demurrer—that is, against the 2nd plea.

Verdict for the plaintiff on the first issue as to the 1st count, and damages assessed at 1s. Verdict for defendant on the issues to the 2nd, 3rd, and 4th counts. The *postea* is not correctly drawn in accordance with such verdict. Mr. Justice Burns, who tried the cause, certified (after judgment had been entered and costs taxed) that the damages recovered by the plaintiff on the 1st count were less than 40s.—that is, under the stat. of 43 El. ch. 6, secs. 2 & 9. The case comes before us on a rule from the Practice Court calling on the plaintiff to shew cause why there should not be a revision of taxation of costs, on the grounds that the bill as taxed contains many objectionable and non-taxable items—or, that costs were taxed and allowed without a certificate of the judge who tried the cause that the freehold or title of the land mentioned in the declaration was chiefly in question—or, that the action being a personal one, and not for any title or interest of lands, nor evincing the freehold or inheritance of land, the damages do not amount to 40s. as certified, &c.

Eccles, for the defendant, contended,

1st, That without a certificate plaintiff was not entitled to more costs than damages.

2nd, That the certificate under the statute was valid, though since the taxation and entry of judgment.

Strong shewed cause, and contended that the pleas are under the new rules all special, and supersede the necessity for any certificate.

That under not guilty, the title could not come in issue any more than under a plea of leave and license, and that the second plea, though overruled on demurrer, did bring the title in question, though no question of fact under it went to the jury.

Purnell v. Young, (3 M. & W. 288) was before the rule requiring “per statute” to be inserted in the margin of the

pleas, by statute; Chitty's Archb. Practice, 7 ed. 1143; Hughes v. Hughes, 1 C. M. & R. 663; Smith v. Edwards, 4 Dow. 624; Dunnage v. Kemble, 3 Bing. N. S. 538, before the rule.

Patrick v. Colerick, 4 M. & W. 527, since the rule, but does not mention it; Jones v. Thomas, 11 A. & E. 193; Imp. Stat. 3 & 4 Vic. ch. 24 sec. 1, which repeals the 43 El. ch. 6, sec. 9, as respects actions of trespass; and see Morgan v. Thorne, 7 M. & W. 400; Lake v. Briley, 5 U. C. Q. B. R. 307; 9 Price, 314.

That it appears on the record that the title did come in question under the plea of not possessed, which was overruled as being too large, but was separately good as to the 1st count; and, though held bad in law, it impeached defendant's possession (which is title enough to maintain trespass) in fact.

2nd: That the certificate under the statute 43 El. is too late after judgment entered—2 Dow. 593; 7 Dow. 253; Watchorn v. Cook, 2 M. & S. 348; Calvert v. Everard, 5 M. & S. 510; Davis v. Cole, 6 M. & W. 624, 20 L. J. Ex. 1; Lyons v. Hyman, Ayr. Rep, Part 2 p. 407; S. C. 1 Price, 601.

That the case could not have been instituted in the county court.

3rd: That defendant's attorney attended the taxation and did not object to the items as taxed, such as all the plaintiff's pleadings, although the issues as to the 3rd count were found for the defendant.

Eccles, in reply urged, that in the contradictory state of the English decisions, the proper duty of the court was to give effect to the statute 22 & 23 Car. II. ch. 9, and not repeal it by construction either under old decisions or the new rules: that the demurrer to the second plea renders it as no plea,, and did not bring the title in question.—Jones v. Thomas, 8 Dow. 99; S. C. 11 A. & E. 193.

That the plea of not guilty is in denial, not in confession and avoidance like a plea of leave and license, and does not impliedly admit plaintiff's title like an affirmative plea; that mere denial admits nothing; that when the declara-

tion is good and not demurred to because the close was not described, the plaintiff must still prove possession, as formerly required in all cases under the plea of not guilty. *Goodall v. Glen*, 6 U. C. Q. B. R.

That the certificate is not too late, only affecting costs, not the judgment; that this application does not seek to set aside the judgment, but merely to modify it in relation to the amount of costs, which is every day practice.

Lastly, that as to specific items that are objected to, the attendance of the defendant's attorney (who may have been inexperienced, or inadvertently overlooked the errors committed) should not conclude the defendant.—*Foxall v. Banks*, 5 B. & A. 536.

MACAULAY, C. J.—The stat. 22 & 23 Car. II. ch. 9, enacts that in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand upon the record that an assault and battery was sufficiently proved, &c., or that the *freehold* or *title* of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under 40s., shall not recover or obtain more costs of suit than the damages so found amount to, &c. The doctrine established under this statute, (however contrary to the original intention and true construction,) seems to be, that when the damages are under 40s. the plaintiff is deprived of full costs only when a certificate of the title to the land coming in question *can* be given, to be determined (as argued by *Mr. Eccles*) by a comparison of the pleadings, issues, and verdict, and when necessary, by referring to the evidence also.—*Mills v. Stephens*, 3 M. & W. 460; S. C. 6 Dow., 593; *Gillett v. Green*, 7 M. & W. 347; 4 Dow. 621.

But no certificate is necessary if it appears on the record that the title was in question.—2 Lev. 234; *Martin v. Vallance*, 1 East. 350; *Redridge v. Palmer*, 2 H. B. 2; *Corner v. Baker*, 2 H. B. 341; *Littlewood v. Wilkinson*, 9 Price 314; *Thomas v. Davies*, 8 A. & E. 508; *Purnell v. Young*, 3 M. & W. 288; *Mills v. Stephens*, 3 M. & W. 460; *Head v. Baldry*, 11 A. & E. 906; *James v. Salter*, 3 Bing. N.

S. 544; *Poole v. Grantham*, 7 M. & G. 1030; S. C. 2 D. & L. 622; *Taylor v. Rolf et al.*, 5 Q. B. 337; *Harrison v. Dixon*, 12 M. & W. 142; *Jones v. Chapman*, 2 Ex. R. 803. These and other cases shew, that since the new rules the defendant is entitled to costs when the general issue (not per statute) is alone pleaded, as no case could arise under it for the judge to certify, and that the plea of not possessed did bring the title in question on the face of the record: and its being held bad on demurrer is equivalent to a verdict for the plaintiff—at least, I perceive no substantial difference; the plea certainly brings the plaintiff's title in question, so far as the plea goes, at least, as respects a possession sufficient to enable him to maintain trespass, which since the new rules has been held sufficient to entitle the plaintiff to costs. It does not seem to have been observed that the plea of not guilty formerly had the same effect, and upon the same principle necessarily put the plaintiff's possessory title in issue, which possession was impliedly alleged in the declaration, calling it his close; wherefore a recovery under the general issue should have formerly entitled the plaintiff to costs without a certificate.

However, I do not see that the plea being found bad in law instead of false in fact, can make any difference as respects the plaintiff's right to costs, except that in the former case (giving effect on demurrer) the judge could not have certified under the statute, for the plea equally impugns the plaintiff's title on the face of it; whether met by a replication or a demurrer, not guilty, per statute was still to be regarded as rendering a certificate necessary; although it is difficult to say on what principle, if it is equivalent to the joint pleas of not guilty, and not possessed, which latter supersedes the necessity for a certificate. I do not find that the title must be in question by reason of the defendant's setting up a conflicting right, or that it is not sufficient if the plaintiff's title against even a wrong doer is chiefly the question.

On the grounds, therefore, that under the pleadings the judge who tried the cause could not have had any opportunity of certifying that the title was in question, as it

could not be questioned under the plea of not guilty; the only issue to be tried, and of course not under the plea of not possessed, after it was overruled upon demurrer, I think the plaintiff is entitled to costs. No doubt this construction goes far to prevent the operation of the statute; but it is now admitted that the act was misconstrued at an early day, but recent decisions have held it too late to retract, and that effect should be given to such decisions. The Imperial Parliament has not explained the act in opposition to the construction of the courts, but as respects trespass quare clausum fregit has repeated it and made other provision by the stat. 3 & 4 Vic. ch. 24 (see *Morgan v. Thorne*, 7 M. & W. 400), which even regulates costs in such cases; until our Legislature interpose, we must give effect to the English authorities, touching the act of 22 & 23 Car II., ch. 9; the English courts have held the old decisions binding on them since the new rules, and so ought we.

As to the certificate under the stat. 43 El. ch. 6, the case cited shews that it is too late after the costs are taxed and final judgment actually entered, as in this case.—See *Gillett v. Green*, 7 M. & W. 347. The taxation may, however, be revised on the minor points if persisted in on payment of costs, the defendant's attorney not having made the objections at the taxation, though present.

McLEAN, J., and SULLIVAN, J., concurred.

MICHAELMAS TERM, 15 VICTORIA.

WILLIAMS V. LEE.

WILLIAMS V. VANSITTART.

Agreement to accept short notice—Notice of assessment served.

Where an attorney had obtained extensions from time to time to plead, agreeing to take short notice of trial, or any notice, or to go down to trial without notice, and short notice of assessment having been served—*Held*, that the Court would not set aside the verdict, on the ground that the attorney had agreed to accept short notice of trial, &c., but not notice of assessment.

Held also, That under the practice here, short notice of trial means four days' notice, the first and last days inclusive.

In the early part of last term, *Hagarty*, Q.C., obtained a rule in both these cases in similar terms, calling on the demandant to shew cause why the verdicts should not be set aside for irregularity, with costs, on the ground that no sufficient notice of trial or assessment had been served, and on grounds disclosed in affidavits and papers filed; or why the verdicts should not be set aside and a new trial had between the parties without costs, on the law and evidence and for misdirection. The applications were supported by affidavits of Daniel G. Miller, Esq., attorney for the tenants, similar in terms in each case, and stating that the declaration in the first case was served on or about the 21st of August; and in the last, on or about the 1st of September last; that in the month of September he applied, on two or three occasions, for time to plead to the demandant's attorney; that on the second application, about the middle of September, he said that he would extend the time but that it must be in terms; that deponent proposed reducing the terms to writing, but that the demandant's attorney said it was not necessary, and that he did not want the deponent to demur to his declaration, that deponent said he would not demur, and did not desire any sharp practice; and that he would accept short notice of trial, and would give the demandant any time to reply, if necessary: that on the 30th of September, on which day the extended time for pleading expired, deponent solicited until noon the following day, the pleas being prepared and only requiring

to be copied : that the opposite attorney refused, and said he would sign judgment the first thing next morning : that deponent filed and served pleas on the 1st of October, that on the 9th of October the demandant's attorney filed and served a demurrer to one of the pleas in the first case, and to two in the last, and replications to the others : that on or about the 18th of October, deponent served a joinder in demurrer, and a demurrer to each of the replications, in consequence of which there was no issue of fact to try : that Monday, the 20th of October, was the last day for serving notice of trial for the Oxford assizes ; and that on the 22nd or 23rd, he remarked to the demandant's attorney that the suits were thrown over, who said it was no matter as it was better to have the law first determined : that on Friday, the 24th of October, three days before the assizes, (the assize day being Monday the 27th) the demandant's attorney having obtained an order as of course to abandon his demurrers to the pleas, served replications thereto and a joinder in demurrer to the tenants' demurrer to the replication, and at the same time served notice of trial and assessment for the following Monday ; that deponent (on the 25th) gave notice that if he proceeded application would be made to set aside the proceedings for irregularity : that finding the suits entered for trial, deponent offered to withdraw his demurrer and put the causes down on the docket, to enable him to send for his witnesses ; but that the opposite attorney refused, saying he could hold verdicts—the notice served as aforesaid not specifying the irregularity alluded to : that no agreement or understanding ever existed that he should accept short notice of assessment of damages or of trial and assessment, or to that effect.

The notices of intention to move against the verdicts if the demandant proceeded, were proved to have been served on the 25th of October.

Cause was shewn by *Leith*, for the demandant, and he filed the affidavits of Edward Blevins, the demandant's attorney, and of John Blevins, the clerk of such attorney. Blevins (the attorney) states that declarations were served on the 1st of September on the tenant's attorney (Miller) :

that shortly before the time of pleading expired he requested further time, which was granted; that just before the expiration of such extended time Mr. Miller's clerk requested more time, his master being absent from home: that Mr. Blevins reluctantly consented to wait till he returned, on the understanding that the time was extended on usual terms; that Mr. Miller, after his return, requested still further time, when Mr. Blevins at first declined granting, saying he would sign judgment the next day if pleas were not put in, but consented to wait till 12 o'clock the next day, not wishing to be sharp or to take advantage: that Mr. Miller urged him to give the time he required, and that he would take short notice of trial, or any notice if necessary, or go down without notice, whereupon Mr. Blevins assented, and gave the time required, but expressly on the terms proposed as aforesaid: that no proposal to reduce any agreement to writing was ever made by the said Miller. He then explains his reasons for demurring to some of the pleas, and afterwards withdrawing the demurrers, which he did by leave of the court: that he then took issues in fact on all the pleas, when the tenants' attorney demurred to the (previous) replications: that Mr. Miller did not offer to withdraw his demurrers and go to trial on the facts: that he (Blevins) did not say his being thrown over the assizes was no matter, &c., but was annoyed at the observation of Mr. Miller on that subject, and asked him if he meant to break faith with him, when he (Miller) said he had only engaged to accept short notice of trial, and not of assessment. He also denies saying he could hold verdicts for the reason stated in Mr. Miller's affidavits; that this application is contrary to the express understanding, and against good faith. Also the affidavit of Mr. John Blevins to the same effect, corroborating Mr. E. Blevins, as to Mr. Miller's offering to take any notice of trial, or go down without notice if granted time. Both deny merits, and Mr. John Blevins asserts that, after the commencement of the suits, both tenants offered to assign the dower to the demandant by serving notice on Mr. E. Blevins to that effect; but that when conveyances were after-

wards tendered they refused to execute the same. For the defendants, it was contended that the undertaking of their attorney did not extend further than to accept short notice of trial, which, according to the practice in England, adopted and recognized here, was four days, one exclusive; that as to his engaging to accept any notice, the affidavits were contradictory; and the only course for the court, under such circumstances, was to hold both parties to the practice, according to the facts in which they do agree.

For plaintiffs it was urged that the agreement to accept any notice was established by the affidavits of two persons, the plaintiff's attorney and his clerk, against the affidavit of defendant's attorney alone; and that, at all events, short notice of trial means four days both inclusive, and so the notice served was in due time.

MACAULAY, C. J.—On reference to the new rules, H. 13 V. No. 25, p. 9, and the statute 2 Geo. IV. ch. 2, sec. 22, the practice, as formerly established by the case cited by the defendant's counsel, must be considered as altered. The four days now required for giving short notice of trial is not under the English practice, where one day is excluded from the computation, but four days under a rule of our own courts.

The notice, therefore, seems to have been given in due time; but were it not so, I think the verdict should not be disturbed for shortness of notice. After the positive affidavits filed in answer to this rule, and considering the indulgence shewn by the demandant's attorney to the defendant's attorney in waiting for the pleas, it seems a reasonable undertaking, and most unreasonable for capricious objections to be taken to the notice served when it was. As to assessment of damages being included, no damages were assessed; nor did the *Nisi Prius* record require that they should be. There was an issue to be tried; and even if damages had been assessed, it would have been unreasonable in the defendant's attorney to urge such an objection. The omission to add the acceptance of short notice of assessment in the terms exacted was mere

inadvertence, and would have been given of course had it been asked. The demandant's attorney did not contemplate demurrers at the time, and the point has arisen out of the course taken by the defendant's attorney.

As to the sufficiency of the evidence and the objection of misdirection, the defendant's counsel did not persist therein in the argument. The verdicts are entered generally on all the issues.

McLEAN, J., and SULLIVAN, J., concurred.

Rule discharged.

DAVIS ET AL V. JARVIS, SHERIFF.

Action for false return—Argumentativeness.

To an action by an execution creditor for not levying and falsely returning *nulla bona* to a writ of *fi. fa.*, the defendant pleaded that at the time of the delivery of the writ there were goods, &c., of the execution debtor whereout he might have levied, &c., and that afterwards and before the return and before a reasonable time had elapsed for seizing the said goods, &c., under the writ, and before any default or breach of duty by defendant as sheriff in respect of the said writ, and before suit to wit, &c., the plaintiffs ordered the defendant not to take any proceedings on the writ until further directed, the plea went on to shew that afterwards and before the return, &c., to wit, &c., the plaintiffs further directed the defendant to proceed and execute the writ, and that at the time of the last mentioned direction and thence continually there were not any goods, &c., of the execution debtor, whereof, &c. Verification.

Upon special demurrer, assigning for cause that the plea was an argumentative and indirect traverse that there were any goods of the execution debtor, whereout the defendant might have levied, and that the omission to levy between the delivery of the writ and the further direction to the defendant was not sufficiently excused by the averment in the plea that the execution of the writ was countermanded before a reasonable time had elapsed for seizing the goods under it. *Held*, that the plea was a good defence to the action, and was well pleaded.

Writ issued 5th August, 1851. Declaration dated 22nd September, 1851.

The 2nd count of the declaration alleges, that on the 12th December, 1850, the plaintiffs recovered a judgment in the County Court of the County of York against Herr Schallehn for a debt of 30*l.*, and 6*l.* 9*s.* 4*d.* for damages and costs: that on the 7th January, 1851, the plaintiffs (having on the 12th December, 1850, issued a writ of *fi. fa.*) issued an *alias fi. fa.* to the defendant, directed against the goods of the said Schallehn, to levy the debt and damages aforesaid, returnable the 1st day of March term then next, endorsed to levy 28*l.* 7*s.* 3*d.* debt and 6*l.* 9*s.* 4*d.* damages and costs, with interest, &c., and delivered to defendant, who was and is sheriff, &c., to be executed, &c.; and although there was

then and afterwards and while said writ was in force and before suit, divers goods of said Schallehn within defendant's said county, and defendant could and might and ought to have levied the moneys endorsed on the said writ, and a reasonable time for so doing had elapsed before the return of the said writ of all which defendant, during all the time had notice : that defendant levied 5*l.* 6*s.* 4*d.*, part of said money, as the goods of said Schallehn, yet did not levy the residue, but wrongfully neglected and refused so to do, and made default, and during all the last mentioned time neglected the execution of the said writ, and afterwards—to wit, in the said March, 1851—wrongfully and falsely returned that said Schallehn had not any more goods and chattels in his county, whereof he could make the residue of the debt and damages as aforesaid or any part thereof as commanded by said writ, whereby plaintiffs are injured, &c.

8th plea to 2nd count.—That at the time the said execution was delivered to him, as in said count mentioned, there were goods of said Schallehn within his county, of which he he had notice, and whereout he might have levied the moneys endorsed thereon ; and that afterwards and before the return of such writ, and before a reasonable time had elapsed for the defendant's seizing or taking the said goods or any part thereof under the said writ, and before any default or breach of duty whatever by defendant as such sheriff in respect of said writ, and before this suit—to wit, on the 8th of January, 1851—the plaintiffs ordered and directed him as such sheriff, and caused and procured him to be ordered on their behalf, not to take any proceedings on the said writ until further ordered to do so, and that from that time until defendant was further ordered to proceed, as after mentioned, the said writ was not in his hands to be executed : that afterwards and before the return of said writ—to wit, on the 1st of February, 1851—the plaintiffs ordered and caused defendant to be ordered to proceed, and execute the said writ, &c. ; and that at the time of such order, and from thence continually hitherto, there were not any goods of said Schallehn within defendants said county, whereof he had notice or could or might or ought to have levied the

said residue in said second count mentioned, of the moneys endorsed in said writ as aforesaid, or any part of such residue. Verification.

Demurrer. Special causes assigned :

1st. That the plea is a circuitous traverse, and amounts to a denial that the said Schallehn had any goods out of which he might have levied the moneys endorsed on the said writ, and should have been pleaded as such.

2ndly. That it neither directly confesses nor avoids the cause of action in the 2nd count mentioned.

3rdly. That although it admits there were sufficient goods when the writ was placed in defendant's hands, yet it does not shew any sufficient reason for defendant not seizing and levying thereon, the allegation that a reasonable time for so doing had not elapsed being insufficient and uncertain, it being defendant's duty to execute the writ forthwith after its receipt: that the delivery and breach of duty in said plea mentioned—that is to say, from the day the said writ was placed in defendant's hands to the 8th of January in the plea mentioned—is not accounted for or excused in any way.

5th. That the plea is double and multifarious, and no direct or certain issue can be taken thereon, in this, that in the inducement it admits that said Schallehn had goods when the writ was received, and alleges for non-execution thereof that a reasonable time had not elapsed, which in itself is a traverse of the breach of duty alleged.

6th. That the plea denies that the said Schallehn had, after the 1st of February, 1851, any goods within, &c., and whereof, &c.

7th. That said plea, in the first part, is pleaded as, and amounts to, an excuse for defendant's liability, and for any breach of duty by reason of a reasonable time not having elapsed; and in another part states matter in discharge of defendant's liability, that is to say the order for him not to proceed, &c.; and the concluding part is in confession and avoidance of the matter alleged in the declaration; that is to say, that after defendant was directed to proceed, &c., the said Schallehn had no goods whereof, &c.

Defendant joined in demurrer.

George Duggan, for the demurrer, contended that the defendant should have traversed the alleged default, or denied goods that he ought to have levied on, &c., instead of pleading specially, in terms not sufficiently answering the declaration, inasmuch as he might have levied before the alleged countermand; and that the reason assigned for not doing so—viz., the want of reasonable time—was insufficient; that he should have said “not guilty,” and so put, as that plea would have done the whole in issue, instead of pleading as he has done that the breach of duty alleged is virtually admitted and yet not avoided in the matter pleaded; that the time between the receipt of the writ and the countermand is not accounted for by merely alleging the want of a reasonable time, but a prompt levy should have been made, and then the goods would have been in *custodia legis*; when the plaintiff directed a stay of proceedings, he would have been secured; that the plea amounts to not guilty, or no goods; that defendant could or ought to have seized, which should have been substituted; that the plea is without precedent.—*Hunt v. Hooper*, 12 M. & W. 664; 14 Ju. 1067; 19 L. I. 90, 260; *Drewe v. Lainson*, 11 A. & E. 529; 3 P. & D. 245.

Jarvis, for defendant, contended, that the time that elapsed between the receipt of the writ and stay thereof, is accounted for by the denial of reasonable time. Though intervening time may have been only a few minutes in fact, it is matter of evidence. The one is laid as the 7th, and the other the 8th of January; but the allegation of time is immaterial, the substance being whether a reasonable time or not.—*Shortridge v. Young*, 12 M. & W. 6; *Wilton et al. v. Young*, 12 M. & W. 805; *Barker v. St. Quintin*, 12 M. & W. 441; *Wintle v. Freeman*, 11 A. & E. 539; *Howden v. Standish*, 6 C. B. 504: that the special matter pleaded could not have been given in evidence under the general issue, and that a special plea was necessary to admit the defence relied on: that neither the plea of not guilty, nor of no goods that he could or ought to have seized, would have done, and the plea is good in substance and form.

MACAULAY, C. J.—The case of *Howden v. Standish*, 6 C. B. 504, shows that the matter pleaded as in defence could not be proved under the plea of not guilty—*de injuria* might be replied to it; and I do not see that it is open to to any of the objections assigned as causes of special demurrer.—*Wright v. Laurason*, 2 M. & M. 738; *Lewis v. Alcock*, 3 M. & W. 188, as to which see *Ashby v. Minnett*, 8 A. & E. 121; *Rowe v. Ames*, 6 M. & W. 747; *Slade v. Hawley*, 13 M. & W. 757; *Barker v. St. Quintin*, 12 M. & W. 441; *Eyre v. Scovell et al.*, 5 C. B. 703, on the point of reasonable time; *Lewis v. Alcock*, 3 M. & W. 188; 5 Scott, N. S. 329; *Drewe v. Lainson et al.* 11 A. & E. 529; 3 P. & D. 245.

MCLEAN, J., and SULLIVAN, J., concurred.

DOE SHERRARD V. LOWRY.

Ejectment—Omission of placita—Irregularity.

The jury having been sworn to try an action of ejectment, after the plaintiff had given evidence in proof of his title it was objected that the record was made up without continuances or second placita, and the defendant refused to confess lease, entry and ouster, and the plaintiff was nonsuited. A *rule nisi* having been granted to set aside the verdict: *Held, per Cur.*, that the rule should have been to set aside the nonsuit *Held also*, that the objection to the *Nisi Prius* record was made too late. *Held also*, that the *Nisi Prius* record might have been amended.

Declaration of Hilary Term, 14 Victoria.

Lot No. 26, 3rd concession west of concession road, Harwhich.

Of Easter Term, 14 Victoria. Defendant pleaded “not guilty,” and the plaintiff added the *similiter*. Then followed, in the *Nisi Prius* record, the *venire*: “Therefore, for the trial of the said issue, the sheriff of the county of Kent is commanded that he cause to come before her Majesty’s justice assigned to take the assize in and for the said county of Kent, on Thursday, the 9th of October, A.D. 1851, twelve, &c., by whom, &c., who neither, &c., to recognise, &c., because as well, &c.” *Nisi Prius* record passed by Deputy Clerk of the Crown for such county the 8th of October, 1851. Consent rule annexed entitled of Easter Term, 14 Victoria, dated 23rd June, 1851.

At the autumn assizes, 1851, the plaintiff was nonsuited

for defendant not confessing lease, entry and ouster, after the plaintiff had given evidence in proof of his title—namely, a patent for the lot to Jacob Elliott, dated the 30th March, 1818; and a deed from Elliott to the lessor of the plaintiff, dated the 21st March, 1820, in consideration of 206*l.*; which, being upwards of thirty years old, did not require proof by a subscribing witness; also several receipts for taxes from the county treasurer; at which stage of the proceedings; the defendant's counsel (Wilson) objected to the form of the *Nisi Prius* record, and refused to confess lease, entry and ouster, and the plaintiff was nonsuited accordingly. During the last term, *Cameron*, Q. C., obtained a rule calling on the plaintiff to show cause why the *Nisi Prius* record and verdict should not be set aside for irregularity, with costs on the ground that the record was made up without continuances or second placita, and in the same manner as records in personal actions.

Read showed cause. The objection came too late. It should have been made before the jury were sworn; that it was amendable—*Whitelaw v. Davidson*, 6 U. C. Q. B. R. 534—and at all events cured by the statute 13 & 14 Vic. ch. 55, sec. 34; that the rule is inaccurate, being to set aside the verdict instead of the nonsuit.

Cameron, Q. C., did not appear to support the rule, but left it to the court.

MACAULAY, C. J.—I think the application fails on two grounds irrespective of the points of exception.

1st. The rule was not to set aside the nonsuit, but the verdict, and there is no verdict. It might however, be ground to set aside the *Nisi Prius* record—*Suker v. Neale*, See 1 Ex. R. 468.

2ndly. But that fails, being within the exception also, as being too late. The objection should have been made before the jury were sworn, at all events before the plaintiff proceeded with his cause, instead of which the defendant allowed him to go into evidence and prove his case, and then refused to confess lease, entry and ouster on this objection. He was not personally called upon in the outset to confess, but the case proceeded as if he had done so. He heard the

plaintiff's evidence, and although no witnesses were cross-examined, the defendant appeared by counsel and should have raised the objection before the plaintiff went into evidence. As to the objection itself, it would have been more regular to have followed the old form, owing to the exception of ejectments in the rule of Hilary Term, 13 Vic. No. 45, p. 14, which orders that the process and proceedings in actions of ejectment shall be and continue as heretofore; but it does not necessarily follow that the term "proceedings" must be construed to include the jurata in the Nisi Prius record, as it may as well be held to contemplate and apply to other proceedings, where even this kind of action differed from ordinary cases, and as reserving only the former practice in these respects wherever they were inapplicable rendering these points of practice, when they corresponded, indifferent, whether according to the old or new forms.

It is to be observed that the first rule in England requiring declarations to be of the day and year in which filed was of Michaelmas Term, 3 Wm. IV. No. 15, Jarvis's Rules, p. 98, under the statute 2 Wm. IV. chap. 39, sec. 14, intituled, "An Act for uniformity of process in personal actions in his Majesty's courts of law at Westminster." This was followed by rule Hilary Term, Wm. IV. rule 2, No. 1, Jarvis's Rules 115, under the statute 3 & 4 Wm. IV. ch. 42, sec. 1, entitled, "An Act for the further amendment of the law, and the better advancement of justice," which required every pleading as well as the declaration, to be so intituled; and upon the subject of actions not personal, as ejectment, replevin, &c., the following cases are cited in Mr. Jarvis's note, p. 99:—*Doe Gillett v. Roe*, 1 C. M. & R. 19; 2 Dow. 690; *Doe Evans v. Roe*, 2 Ad. & El.; *Miller v. Miller*, 1 Scott, 387; 3 Dow. 404, 408; *Barnes v. Jackson*, 1 Scott, 253; *Dod v. Grant*, 4 A. & E. 485; 6 N. & M. 70; *Alderson v. Johnson*, 2 M. & W. 70; 5 Dow. 294: to which may be added *Doe Ashman v. Roe*, 1 Bing. N. S. 253; 2 M. & Scott, 606; 3 M. & Scott, 373.

The new rules in Upper Canada, Easter Term, 5 Vic. 1842, are founded on provincial statute 7 Wm. IV. ch. 3,

entitled, "An Act for the further amendment of the law and the better advancement of justice," and is taken from the last above mentioned act of 3 & 4 Wm. IV. ch. 42, sec. 1. When these rules were passed, they were only applicable to one court, that is, the Court of Queen's Bench. Our act speaks generally of "actions at law." These rules were confirmed by provincial statute 6 Vic. ch. 9 (1842), and in the recital follow the statute, in the words, "all actions at law."

No. 23 of these rules—Cameron's Rules, p. 29—provides that the entry of continuances by way of imparlance, *curia adversari vult*, or otherwise, shall be made upon any record or roll whatever in the pleading, except the *jurata ponitur in respectu*, which is to be retained. The form of such entry is given in No. 45, page 64, of Cameron's Rules, No. 2. No. 29, p. 35, provides that every declaration should be entitled in the court, &c., of the day of the month and year in which it is filed; and so of every pleading by No. 30. There is nothing in terms restricting these rules to personal actions or excluding ejectments; but as declarations in ejectment are served before being filed, unless afterwards altered upon the appearance of the tenant, the proceeding is not adapted to the rule requiring declarations to be dated of the day on which filed, though such declaration may be entitled of a particular day, according to *Doe Ashman v. Roe*, ante. The rule Hilary Term, 13 Vic. No. 45, ante, may exclude the form for concluding the *Nisi Prius* record given therein, No. 40, pp. 12 & 13; but whatever form be adopted, the effect is the same, unless there is to be a trial at bar. The jury are to come at the assizes; and the statute 13 & 14 Vic. ch. 55, secs. 29, 34; provides for the practice and forms, &c., unless thereby altered, &c., and was passed subsequently to the rule Hilary Term, 13 Vic. They were to some extent framed in consequence of the statute of 12 Vic. ch. 63, sec. 29, which act altered the form of process from the *ca. re.* to the summons in personal actions. See secs. 22 & 34. It is not necessary to determine whether the conclusion of the record is really irregular or defective. I think it is substantially right, and that

the irregularity, if any, is cured by the defendant's appearance, &c. ; and, under the circumstances, any more formal entry is immaterial. The Nisi Prius record might be amended.--1 Dow. N. S. 101.

McLEAN, J., and SULLIVAN, J., concurred.

Rule discharged.

JOHN DOE ON THE DEMISE OF DUFF ET AL. V. DOUGALL ET AL.

Ejectment—Leave to amend by adding demise, abandoned.

A judge's order having been obtained to amend the proceedings in an ejectment suit, after the consent rule and plea had been filed, (by adding three new demises), and no proceedings having been taken under the order until the commission day of the assizes—being some months after the granting of the order—when the Nisi Prius record was passed with additional demises. The record was entered for trial, and the defendants made no objection to the case proceeding until after the jury had been sworn and the plaintiffs had given evidence, when the defendants objected to the amendment and refused to confess lease, entry, and ouster, except to the original demises, and a verdict was entered for the lessors of the plaintiffs on the original demises only.

Held, on an application to set aside the verdict on the original demises, that the new demises added to the Nisi Prius record did not violate the N. P. record or verdict ; and that the lessors of the plaintiff could abandon the order to amend. *Held*, also, that after the defendants appearing and confessing lease, &c., it was too late to object to the regularity of the notice of trial.

Part of lot No. 3, 1st concession of the township of Malden, or No. 9, Berczy Block, specially described in the consent rule. The declaration is entitled of Michaelmas Term, 14 Vic., and was originally upon the three first demises only. The plea of not guilty, is entitled Hilary Term, 14 Vic., the 21st February, 1851. *Venire*—jury to come the last day of Easter Term next. Continuance, to last day of Trinity Term next. Second placita of Trinity Term 15 Vic. 1851.

Jury respite until 1st of Michaelmas Term next, unless, &c. The consent rule is entitled Hilary Term 14 Vic., in name of John Doe, upon the three first demises only, and bears date the 21st February, 1851. The three last demises were added under a judge's order, after the consent rule and plea had been filed.

At the trial, the defendant's counsel objected to the amendment and refused to confess lease, entry and ouster, and possession, except as to the three first demises, on which alone the plaintiff in consequence proceeded, and obtained a verdict thereon—nothing being said of the three last demises in the entry of the verdict, on the notes of Draper, J., who tried the cause ; it was noted by him that defendant confessed lease, &c., but it was afterwards struck out.

Wilson, Q. C., for defendants, obtained a rule calling on the lessors of plaintiff to shew cause why the *Nisi Prius* record, and all proceedings thereon, should not be set aside with costs, on the grounds—

1st, That the record is made up by adding counts which have not been filed or served on the defendants' attorney, and by adding a plea for the defendants to the alleged declaration on the record, which the defendant had never pleaded ; and because,

2ndly, The rule annexed to the record is not entitled in the cause in which the record is, nor is the record warranted by the said rule ; and because,

3rdly, There could have been no trial or verdict in the cause, as the defendant did not appear to or consent to the lease, entry, ouster and possession upon this record. An affidavit was filed, entitled as in a cause on six demises of *Albert Prince*, defendants' attorney, and *Morris*, Deputy C. C., that about the 15th August last he received a copy of an order, dated 24th April, 1851, of *Draper, J.*, entitled as in a cause on three demises, granting leave to amend the declaration by inserting three additional counts or demises corresponding with the three last demises in the declaration contained in the *Nisi Prius* record ; that no amended declaration was ever served, nor any plea filed, nor any consent rule amended or entered into in accordance with such order ; that on the 7th October, defendants' attorney was served with notice to produce at the trial of that cause a deed therein mentioned, entitled as in a cause *Doe ex dem. Wm. Duff, Alex. Callum, and Wm. Mager*, against defendant ; that no amendment was ever made in the documents filed in the office of the Deputy C. C., until the commission day of the last assizes at *Sandwich*, at which time the record was passed in accordance with the order to amend then filed.

It appeared, on shewing cause, that, on the 25th October, 1851, the general issue was pleaded by defendants, entitled as in six demises, and replications demanded. 30th September, 1851 ; notice of trial, entitled as in the six demises, was served for the assizes on Tuesday, the 14th October,

1851; also, on the same day, notice to admit an indenture dated 16th October, 1849, entitled as in six demises, at the bottom of which the defendants' attorney, Albert Prince, agreed to make the admission specified in the above notice and subscribed the same.

It appears, therefore, that the original declaration was in three demises; that to such declaration the defendants appeared, entered into the usual consent rule as tenants, and pleaded not guilty; that afterwards notice of trial was given for the last spring assizes, and notice to produce, &c., served but that the case was not then tried; that afterwards, on the 24th April, 1851, the plaintiff obtained a judge's order for leave to add three more counts or demises, when served not appearing, but it was received by defendants' attorney on the 15th August; that on the 30th September, notice of trial and notice to admit a deed, entitled as in the amended cause, was served on defendants' attorney, who accepted such notice and agreed in writing to admit the deed, but no amendment was made in the declaration till the 14th of October last, being the commission day of the assizes; on the 7th October, a notice to produce was served, imperfectly entitled in the names of the lessors; that since the trial, defendants' attorney has filed a plea to the amended declaration; that, at the beginning of the trial, lease, &c., confessed was entered, but struck out, and that after evidence given and admissions made of the original right of Charles Berczy, under whom plaintiff claimed, and of his deed, dated 16th October, 1849, to some of the lessors, &c., and of the order to add the demises of the 24th April last, defendants' counsel objected to the want of amendment and refused to admit lease, entry, &c., except as to the three first demises, in which alone plaintiffs proceeded and obtained a verdict after giving additional evidence, no further defence being made.

Macdonell shewed cause—That, admitting the amendment attempted to have been imperfect and abortive, no verdict was given on the three new demises, and the objection is reduced to a mere irregularity in adding those demises, which are rendered immaterial, and the objection

comes too late after the jury have been sworn and the trial had proceeded under a tacit admission of lease, entry, ouster and possession, without exception, although the defendant knew the style of the cause had been altered, and appeared by counsel; that in such amendments in ejectment no declaration is served, nor does the defendant plead *de novo*, which was the ground of objection at Nisi Prius; that the undertaking to admit documents was a step in the cause, and recognized the new style as to all the demises, and estopped the defendants—Cameron's Rules, p. 32, No. 28; and R. H. T., 13 Vic., p. 7, No. 22—No. 45, p. 14; Bell v. Graham, 2 U. C. R. 37; Ketchum v. McDonnell, 2 U. C. R. 378; Doe Leonard v. Meyers, 2 U. C. R. 382. That it is not shewn the amendment was not in fact made before the N. P. record was passed, although made on the court day.

Wilson, Q. C., in reply, contended that nothing was done under the order to amend, but the first step after its service was on the 30th of September, when an irregular notice of trial was given; that an irregular notice of trial need not be returned—Wood v. Harding, 3 C. B. 968; that no such cause existed as in the altered title, and the defendants were not aware that the amendment had not been made; that the defendants did not admit any lease, entry, and ouster at all.

As to entitling the papers—9 Jur. 829; Doe Pratten v. Board, 10 M. & W. 675. Lessors who do not join in the consent rule not liable to costs, and defendants would have no remedy against the new lessors—Cotterel v. Apsey, 6 Taunt. 322; Heath v. Freeland, 1 M. & W. 543; 11 Jur. 1012; Mayhew v. Blofield, 1 Ex. 468; Hamlet v. Breedon, 4 M. & G. 909.

MACAULAY, C. J.—I think the rule should be discharged. It is not distinctly shewn that the additional demises were not added to the declaration by way of amendment before the record was passed. The defendants appeared by counsel, and made no objection to the case proceeding until after the jury had been sworn, and the plaintiffs had given evidence partly upon admissions made by the defendants' counsel. No formal admission of lease, entry and ouster

was made at the outset, but the learned judge supposed it tacitly done, and noted it as made in the beginning of the case, but afterwards struck it out upon the objection being raised, and noted the restricted admission which was then made as to three demises only. I have referred to him on the point, and he says the admission of lease, entry, &c., as to the three first demises, was made, as noted by him. After this it is too late to take exceptions to the regularity of the notice of trial, the defendants appearing, and consenting as they did, waived it, if irregular. The consent rule stands good for three demises. It is probable the lessors of the plaintiffs should have taken steps for its amendment by adding the additional lessors, as otherwise they would not become liable for costs. If the *Nisi Prius* record is supported by an amended declaration, and the contrary is not shewn, I do not see that it can be set aside; the objection, if any, is higher up. It was not necessary to produce the consent rule—*Doe Greaves v. Raby*, 2 B. & Ad. 984—and it does not follow because the consent rule was not altered that the trial on the three admitted demises was not good; and the fact that such admission was made, cannot be disputed in the face of the learned judge's report. Amendments by adding demises are not unusual—1 D. & R. 173; 8 Jur. 363; 3 Dow. 206; 1 C. & K. 555; 1 Dow. & L. 954; 5 Tyr. 171; 6 Dow. 774. The practice as to the consent rule in making such amendments, I do not find laid down. But, until lessors or defendants become parties thereto, they do not seem liable to costs—9 Jur. 829; *Doe dem. Lloyd v. Roe*, 15 M. & W. 431; *Doe dem. Harrison v. Hampson*, 4 C. B. 745; *Doe dem. Merigan v. Daly*, 8 Q. B. 934; 4 D. & L. 765.

Rejecting everything relating to the three new demises, all would be right; and I do not see they may not be rejected, or that they violate the *Nisi Prius* record or verdict in relation to the original three. An order to amend may be abandoned—3 Dow. 255; 5 Tyr. 171; 1 C. M. & R. 521. But notice must be given—6 Dow. 774. Here it was done owing to the objections of the defendants' counsel in open court.

As to the entitling affidavits in several demises, see 5 Dow. 447 ; Cook v. Vaughn, 4 M. & W. 68 ; 11 Jur. 904, 905 ; Ross v. Graham, U. C. R. ; Duke of Brunswick v. Sloman, 17 L. J. C. P. 81.

McLEAN.—No affidavit of merits is put in ; and unless the proceedings are wholly irregular, no reason is shewn for the interference of the court with the verdict. The defendants cannot object to the notice of trial. They appeared at the trial, and admitted a certain document necessary to the case of the lessors of plaintiffs, and by that waived all objection to the notice. Then they did confess lease, entry and ouster, as to the demises contained in the original declaration, and on which alone the verdict is taken. By the evidence admitted by the defendants, the lessors of plaintiffs were entitled to a verdict on these demises, and so far the verdict is right ; but there is no finding of a jury on the demises contained in the amendment, which appears on the record. As to these, the lessors of plaintiffs might choose to abandon them at the trial, and to proceed only on the first three demises. In that case, the defendants might claim as to them a verdict in their favour, if they had gone on with their defence. There was a plea on the record which applied to them, as well as the three first demises, though the consent rule was only to the latter. If the defendants abandoned any defence which they might have on the ground of irregularity, after entering upon the trial, (and they have themselves waived these irregularities by their proceedings) they cannot now come into court and ask that a verdict properly found on the three first demises on the record, shall be set aside, because certain other demises have not been disposed of. The lessors of plaintiffs may enter a *nolle prosequi* to these demises, or they may consent that a verdict may be entered on them for the defendants on the ground that they were abandoned at the trial, or that no evidence was offered to support them.

SULLIVAN, J., concurred.

Rule discharged.

WILLIAMS V. LEE AND WILLIAMS V. VANSITTART

Dower—Replication to plea ne unques accouple.

Replication to a plea of ne unques accouple; that the demandant on the first of May, 1790, and before suit was accoupled to A. B. deceased, in lawful matrimony, concluding to the country. Demurrer: That the replication does not state or allege when, where, or in what kingdom, &c., demandant was accoupled to the said A. B. in lawful matrimony as therein alleged, or by what minister, &c., or according to what religious rite, or by what law, &c., nor is it therein alleged that the said marriage was contracted before or during seizin of the said A. B. *Held*, that the replication was good without alleging when, or by whom or by what form of religious rite the demandant was married.

Plea: That the said A. B. was not, &c., seized of the said lot, &c., or of any part thereof of such an estate, whereby he could endow defendant thereof: verification, &c.

Replication: That the said A. B., &c., was seized of such an estate in the said lot, &c., whereby he could endow demandant thereof; to the country.

Demurrer: That the replication is uncertain and insufficient in alleging that he had such an estate, &c., without showing what estate he had, or was seized or possessed of in the said land, or whether it was such an estate as entitled her to dower at common law, or under the statute 4 Wm. IV., ch. 1, &c.

Held, That the plea should have concluded to the country, and that the objection applies equally to the plea, which does not deny that any such interest in the husband as under the statute would have entitled the demandant to dower, and that the replication meets the plea and alleges a seizin, which is therein denied.

Replication to third plea: That the said A. B. was at the said several times when, &c., in the third plea mentioned, a good and lawful subject of the United Kingdom of Great Britain and Ireland, &c., and was not an alien or subject of the United States of America, as in said plea alleged; to the country.

Demurrer: That the replication is double and uncertain, in taking issue on several distinct and material facts—namely, in denying the allegation that the said A. B. was not a subject of the United Kingdom, &c., and also denying that he was not a subject of the United States, and also that he was at any time an alien: that it should have shown either that the said A. B. was a natural born subject, or a naturalized subject, or how otherwise.

Held, That the replication, taking issue on both the branches of the plea, is good.

Replication to the 4th plea: That she did become entitled to demand her dower, &c., within 20 years next, before the commencement of the suit, *modo et forma*.

Demurrer to replication: That it is not shown or stated affirmatively when or in what day the said demandant became entitled to demand her dower in the said land, &c. *Held*, that the replication alleges time—namely, within 20 years—though not the day, but that the day need not necessarily be stated.

Both these cases are before us upon demurrers and upon rules to shew cause why the verdict for demandant upon the issues to the country should not be set aside.

The declarations are both entitled of Trinity Term, 15 Victoria, the former on the twenty-third of August, and the latter the first day of September, 1851. Venue, county of Oxford.

In the first case, the demandant, who was the wife of Frederick Williams, deceased, demands against defendant

one-third part of ten messuages, ten barns, ten stables, ten gardens, four orchards, one saw-mill, two hundred acres of land, two hundred acres of pasture, two hundred acres of meadow, and two hundred acres of wood land, with the appurtenances, situate and being on lot number eleven, in the second concession of the township of East Oxford, &c., as the dower of the said demandant of the endowment of the said Frederick Williams, deceased, heretofore her husband, whereof she hath nothing, &c.

On the first day of October, 1851, defendant Lee pleaded: first—that the demandant ought not to have her dower in this behalf, because she was never accoupled to the said Frederick Williams in lawful matrimony, which he is ready to verify: wherefore he prays judgment, if she ought to have her dower of the third of lot number eleven, &c.

Second: That said Frederick Williams was not on the day on which he espoused the demandant, or at any time afterwards, seized of the said lot number eleven, &c., or of any part thereof, of such an estate whereby he could endow her thereof, which he is ready to verify: wherefore, &c., concluding as in first plea.

Third: That the said Frederick Williams, who was the husband of demandant, before and at the time of his marriage with her—to wit, on the first day of May in the year of our Lord one thousand eight hundred and two—and thereafter until his death, was an alien and subject of the United States of America, and was not then or at any time a subject of the United Kingdom of Great Britain and Ireland: verification.

Fourth: That demandant hath not been entitled to demand her dower of and in the lands in the declaration mentioned, or any of them at any time within twenty years next before the commencement of this action, modo et forma, above demanded: verification, and prays judgment if she ought to have her dower in this behalf.

Fifth: As to one hundred acres of land, with the appurtenances, situate on part—to wit, on the south half of said lot number eleven, part of the said ten messuages, &c., (enu-

merating the premises as in the declaration), in the said demand mentioned, and whereof, &c., that he cannot render to her her dower thereof, or of any part thereof; because he is not, nor from the day of the commencement of this suit, or at any time since, has been tenant thereof, or any part thereof, as of freehold or otherwise, or of any estate or interest whatsoever, solely or jointly with any other person: verification. Wherefore, as to the said parcel, &c., he prays judgment.

On the ninth of October, 1851, the demandant replied: First—to the first plea: That she, on the first day of May, 1790, and before this suit, was accoupled to the said Frederick Williams, deceased, in lawful matrimony; concluding to the country.

Second—to the second plea: That the said Frederick Williams, in his lifetime and after his marriage with her, while she was his wife and before this suit—to wit, on the first day of May, 1790, was seized of such an estate in the said lot number eleven, &c., whereby he could endow her thereof: concluding to the country.

Third—to the third plea: That the said Frederick Williams was at the said several times when, &c., in that plea mentioned, a good and lawful subject of the United Kingdom of Great Britain and Ireland, and of this realm, and was not an alien or subject of the United States of America, as in said plea alleged: concluding to the country.

Fourth—to the fourth plea: That she did become entitled to demand her dower in the said lands, &c., in the declaration mentioned, within twenty years next before the commencement of this suit, in manner and form therein demanded: concluding to the country.

Fifth—to the fifth plea: That the defendant (Lee) was at the time of the commencement of this suit the tenant of the freehold of and in the lands with the appurtenances in the introduction of that plea mentioned, in manner and form as therein is alleged: concluding to the country, and similiter.

On the sixteenth of October, 1851, the defendant or tenant, demurred to the first, second, third, and fourth replications, assigning for special causes:—

To *the first*: That it does not state or allege when, where, or in what kingdom, country, province, district, county, or parish, or other place where, or in which, said demandant was accoupled to said Frederick Williams in lawful matrimony^m as therein alleged; or by what minister, magistrate, or according to what form of religious rite; or by what law, usage, or custom, the said marriage was had and observed: nor is it therein alleged that the said marriage was so solemnized or continued (contracted), before or during the seizin of the said Frederick Williams, of the land whereof dower is demanded.

To *the second*: That it is uncertain and insufficient in showing the demandant's allegations that the said Frederick Williams was seized of said lot number eleven of such an interest whereby he could endow her, and states that he had such an estate without shewing what estate he had or was seized or possessed of in the said land, or whether it was such an estate as entitled her to dower at common law, or under the statute fourth Wm. IV. chap. 1, or whether it was legal or equitable estate, or land to which said Frederick Williams had only a right of entry or right of action for the recovery or entry upon or possession of said land.

To *the third*: That it is double and uncertain, in taking issue on several distinct and material facts—namely, in traversing the allegation that said Frederick Williams was not a subject of the United Kingdom, &c., and also denying that he was at any of the said times when, &c., a subject of the United States, and also that he was at any time an alien: that the said replication was insufficient in not shewing either that the said Frederick Williams was a natural born subject of the said kingdom, or a naturalized subject thereof, or how otherwise.

To *the fourth*: That it is not shewn or stated affirmatively when or on what day the said demandant became entitled to demand her dower with said land, &c.

On the twenty-fourth October the demandant joined in demurrer: whereupon the sheriff of the county of Oxford is commanded that he cause to come here on the sixth day

of September, 1851, twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., become as well, &c.

Second placita of Michaelmas Term, fifteenth Victoria, one thousand eight hundred and fifty one: Jury respited until the seventeenth of November, one thousand eight hundred and fifty one, unless the judge of assize (naming him) should first come on the twenty-seventh day of October, one thousand eight hundred and fifty-one; for default of jurors, &c., and day is given to the parties at the same place.

The verdict is entered generally for the demandant, without any assessment of damages.

In the declaration against the defendant Vansittart, that first, second, third, and fourth pleas, the replications and demurrers thereto, are similar in all respects to the same pleadings in the first case.

The fifth plea is a general plea of non-tenuit, stating that defendant is not, nor from the day of the commencement of this suit, nor since, has been tenant, &c.

The sixth plea is similar to the fifth plea in the first case, except it mentions the *north* half instead of the *south* half of the lot number eleven.

The replications to these pleas allege that the defendant was tenant at the time of the commencement of the suit, &c.: concluding to the country.

The venire is similar; so also is the second placita; and the verdict is entered generally for the demandant, without any assessment of damages.

MACAULAY, C. J.—The new rules, Easter Term 5 Victoria, 1842, (Cameron's Rules, page 27, number 31), provide that the venue laid in the margin shall govern, and that no venue shall be stated in the body of the declaration, or any subsequent pleading: provided that where local description is required it shall be given.

Since the new rules place for mere purposes of venue need not be stated in the declaration, or subsequent pleadings—4 Tyr. 854, 2 Dow. 680, 2 D. & L. 27, 5 Tyr. 214, 1 C. M. & R. 590.

In the present case the venue is laid in the county of

Oxford, in which the lands out of which dower is claimed are alleged to be situated.

2 Saund. 44 (3), 446 (4), which was a case of dower, &c., *ne unques accouple*; 2 H. B. 145. Ilderton v. Ilderton—that when the issue is to be tried by the country it should be in the county where the venue is laid. There the objection was that the replication alleged a marriage at Edinburgh, in Scotland, and concluded to the country without stating any place by way of venue where it was had; and the replication was held good on special demurrer, both as to its conclusion and the place where the espousals were alleged. See *ib.*, p. 149, 151, 159, 160.—This case shews that the trial must necessarily be where the venue is laid, and that the replications must follow the count.—1 Chy. Pleading, 624, 2 edition; 1 Saund. 8 (2) (d); Blake v. Dordemead, 2 Ld. Ray. 1504; Stra. 775; Neale v. De Garay, 7 T. R. 243; Phillips v. Moor, 5 U. C. R. 24; Stephen's Pleading, 316, 7, 8.

Jackson on real actions, 317, recommends the plea of *ne unques accouple* to conclude to the country, where the trial must be by jury; and, inasmuch as a marriage is impliedly alleged in the demanding count, I see no good reason why it should not.

It appears to me, therefore, that the replication is good without alleging when, or by whom, or by what form of religious rite, &c., the demandant was married; they all constitute matters of evidence; *the onus probandi* is on her, and she must prove a valid marriage sufficient to entitle her to dower. If she can do that, it is immaterial where she was so married.

The last cause of demurrer points rather to the count than the replication. If the count is good it impliedly alleges a seisin of the husband during the subsistence of the marriage, and the want of such seisin constitutes a sufficient ground of defence, and forms the subject of another plea. Here the marriage is denied, not the seisin; the plea of *ne unques* seised admits the marriage, but denies seisin at any time during the converture.

It was not necessary that he should have died seized, to entitle her to dower.

I think the demurrer should be overruled.—*Robinet v. Lewis*, Draper's Reports, 45. 2nd, as to the second replication—the plea ought to have concluded to the country, according to all the forms—2 Will. 118 ; 3 Chy. Plg. 1316 ; 2 Saund. 329–44, b. 5 ; 10 Went. Plg. 160–1.

And the objection applies equally to the plea, which does not deny any such interest in the husband, as under the stat. 4 Will. IV. ch. 1, sec. 114, would have entitled the demandant to dower, and which must be regarded as all included and averred by implication in the declaration.

The replication meets the plea and alleges a seisin, which is therein denied. An issue joined on such pleadings might require stricter proof of actual seisin than the statute would impose, but the demandant by replying, takes upon herself the burthen of such proof. The tenant cannot, by pleading *ne unques* seised, force the demandant to state the nature of the husband's interest in the replication, any more than she is bound to do in the count ; it is a matter of evidence, and it suffices that the replication supports the count and raises the same issue that the plea would have done had it concluded to the country. See *Vin. Ab. Dower M.* pl. 17 & 84, citing *Br. Dower*, pl. 35. If tenant pleads that *Baron ne fuit unques seisie que dower la poit*, the other shall not plead special matter, but shall say that *seisie que dower la poit* shall give the matter in evidence. See 9 *Vin. Ab.*, *Dower*, Ma. 39 ; *Br. Dower*, Ab. 75.

Provincial statute 13 & 14 Vic. ch. 58, sanctions the declaration or count.

3rd *Vin. Ab. Alien H.*, 1, 4, 5, 11 ; 3 *Sal.* 28 ; *Comb* 212, *Carth.* 265. The plea itself seems questionable ; it does not allege that the baron was born out of the allegiance of the king, and within the allegiance of the United States, but that he was an alien and subject of the United States, and was not a subject of the United Kingdom, without negating any of those circumstances by which he might have become naturalized. He might have been an alien and subject of the United States, as respected birth-place,

without being an alien born, or consistently with his having been born within the king's allegiance. *Casseres v. Bell*, 8 T. R. 166.

The plea does not show how he was an alien—first, by being born in a foreign state, and without the allegiance, &c., and he might be a subject of the United States by naturalization without being an alien born—he may have been born within the allegiance of the king; the plea does not shew him not to be a subject of the king of England by stating his foreign birth out of the allegiance.

The gist of the plea is, that the baron was not a British subject, and the best pleadings said to be *extra ligeantiam domini regis*, &c., and *infra ligeantiam alterius regis*—7 Co. 16; Sid. 357, pl. 10; *Nictwell v. Porolitt*, Carth. 302, 303; S. C. 4 Mod. 286, Lev. 78.

These cases show, I think, that the replication is good, taking issue upon both branches of the plea, the objection that formerly prevailed on the subject of venue no longer applies, and the concluding part of the replication raising an immaterial issue may be rejected.—1 Saund. 8, (2) (d.); *West v. Sutton*, 2 Ld. Ray. 153; *Ord v. Howard*, 12 Mod. 125; 1 Went. 7. The demandant has taken issue in the terms of the plea denying his being a subject in general terms; how a subject is matter of evidence—the plea does not specify negatively all those means by which he might become such; nor is the demandant bound to reply how the husband was a subject—*Aliens*, 162, 163; *Bro. Bar.* 1 Pl. 63, cited *Vin. Ab. supra*; Stat. 13 & 14 Vic., ch. 58; *Bodenham v. Hill*, 7 M. & W. 274; *Smith v. Dixon*, 7 A. & E. 1; *Webb v. Weatherly*, 1 Bing. N. S. 502; *Brogden v. Marriott*, 2 Bing. N. S. 473; *Bell v. Tuckett*, 3 M. & G. 785. An alien husband cannot confer right to dower—1 Moore P. C. 278; *Com. Dig.*, Alien C. 4; 1 Lev. 47; 1 C. & K. 390. The replication is no more double than the plea—2 Saund. 295 (c) (b); *Reynolds v. Blackburn*, 7 A. & E. 161; 1 Dow. N. S. 940.

The plea itself is one of time; the replication does allege *time*—viz., within twenty years—though not the day. It is, I believe, the usual form of a replication to such plea, and

the rule is, that *time* must be stated; not necessarily the day or a day. Jones v. Price, 3 Bing. N. S. 52; Wright v. Williams, 1 M. & W. 77; Tyr. 589; Lane v. Thelwell, 1 M. & W. 140; Leaf v. Lees, 4 M. & W. 579; Sprig v. Wright, 9 M. & W. 629; Bingley v. Durham, 8 A. & E. 775; Tempest v. Kilner, 2 C. B. 300. See Ch. Jur. forms 345—replication to pleas *actio non accrevit*, &c., that the cause of action did accrue.

MCLEAN, J.—I concur in the opinion given by the Chief Justice on the demurrers to the replications to the first, second, and third pleas. There does not appear to me to be any foundation for any of them, inasmuch as the replications are clear and explicit answers to the several pleas of the tenant, and put in issue the very points which the pleas were intended to raise.

The first plea alleges that the demandant was not accoupled in lawful matrimony to Frederick Williams, and to this the demandant replies, that she was accoupled in lawful matrimony to the said Frederick Williams on the first day of May, 1790, and before the commencement of this suit—there is surely an issue taken on the tenant's plea; and, whether the marriage was celebrated in one country or another, or by a clergyman of one denomination or another, or by a magistrate, in the absence of all clergymen, must be wholly immaterial, provided the marriage was one recognized by law. It is also assigned as a cause of demurrer to the first plea, that it does not allege that the marriage was solemnized before the seizin of Frederick Williams, of the lands whereof dower is demanded. A day is specified on which the marriage is alleged to have taken place, but the demandant would not be bound to prove a marriage on that particular day—provided such facts were shown as would establish a legal marriage at any time before or during the seizin of the husband in the premises.

The second plea of the tenant, on which issue is taken by the demandant, puts in issue the seizin of Frederick Williams in the premises, during his marriage with the demandant. The replication to this plea, which is also demurred to, alleges that Frederick Williams, after his

marriage with the demandant, and *while she was his wife*, and before the commencement of this suit, to wit, on the first day of May, 1790, was seized of an estate in the premises whereby he could endow the demandant. To this the tenant objects, that the demandant does not shew the *particular estate* which Frederick Williams, her husband, had in the premises. Now, whether he was seized of a legal or an equitable estate, or whether she became entitled to dower by the common law or by statute, need not appear on the record. It is enough that it is distinctly stated that Frederick Williams had, during his marriage with demandant, such an estate in the premises as would entitle her to dower. On the issue, as taken by the demandant's replication, it would be incumbent on her to prove the estate of her husband, and she would be at liberty to prove any estate from which dower would arise to her. If she had set out any particular estate in her husband, she would be limited in proof to that estate on the trial, and if she failed in that respect, she would be defeated in her suit, though she might be able to prove such other estate in her husband, as ought to entitle her to succeed. The demandant was not bound in her replication to shew any particular estate in her husband; it is sufficient if the estate from which dower is claimed, is shewn by evidence at the trial.

The tenant's third plea alleges that Frederick Williams, the demandant's husband, was, at the time of his marriage, to wit, on the first day of May, 1802—and thereafter, until and at the time of his death, an alien and a subject of the United States of America, and was not then or at any time a subject of the United Kingdom of Great Britain and Ireland; to this the demandant replies, that at the said several times when, &c., the said Frederick Williams, her husband, was a good and lawful subject of the United Kingdom of Great Britain and Ireland, and was not, at any of the said several times, when, &c., an alien or subject of the United States of America.

The tenant demurs to this replication, on the ground that it is double and uncertain, in taking issue on several distinct and material facts, and that it does not shew whether

Frederick Williams was a natural born subject or a naturalized subject. The replication, however, is only an answer to the plea ; and, being so, it is not liable to the objection that it is double or uncertain. It would probably have been a sufficient answer to the plea to have alleged that Frederick Williams, at the several times, when, &c., was a good and lawful subject of the sovereign of the United Kingdom of Great Britain and Ireland, because, if he was so, he could not at the same time be an alien or a subject or citizen of the United States, so that his wife could not be endowed of his lands. We are all aware that foreigners are admitted in the United States to the rights of citizens on certain terms ; but a British subject does not by becoming a citizen under the laws of the United States divest himself of all right to return to his own country, and to resume the rights and obligations of a subject ; and if previous to or in fact at any time during or after his residence or citizenship in the United States, he acquired property in this country. He would be entitled to hold it without question as to his right ; and his wife if a subject would be entitled to dower in the event of his death. The demandant has gone further in the replication than was perhaps necessary, in stating that her husband was not a subject of the United States ; but her doing so cannot surely be a cause of complaint to the tenant, when it is only in reply to his own allegation on that subject.

The 4th plea alleges that the demandant has not become entitled to dower at any time within twenty years and to this the demandant replies that she has become entitled to dower within twenty years. This replication is demurred to because it is not stated when the demandant became entitled. To the plea of non-assumpsit *infra sex annos*, or *non accrevit actio infra sex annos*, the reply always is, that the defendant's promise is within six years, or that the action has accrued within six years : so in this case it is sufficient to shew that the demandant has become entitled to dower at any time within twenty years ; and whether within five or fifteen years must be wholly immaterial, so far as the right to dower is concerned. As the several grounds of

demurrer appeared to me to be wholly untenable, it is unnecessary to enter into the consideration whether the pleas objected to are good or not—my impression is, that the objections taken to them are well founded.

SULLIVAN, J., concurred.

Judgment against demurrer.

WHITE V. LAING.

Exchange of lands—Widow of naturalized alien.

A demandant of dower is not entitled to dower out of land of which her husband died seized, and likewise out of other land of which the husband was seized in his lifetime and which he had given in exchange for the land of which he died seized. The widow is entitled to elect out of which property she will take her dower—such election must be pleaded by a party defendant in an action for dower. The widow of an alien who has been naturalized is entitled to dower.

Declaration dated 5th September, 1850.

Demandant who is wife of John White, deceased, demands against defendant one-third of ten messuages, &c., in the township of Charlottesville, county of Norfolk, as her dower of the endowment of said John White, &c.

By particulars annexed the dower is said to be claimed out of the south half of No. 9, 2nd Concession, Charlottesville. On the 16th of October, 1851, defendant pleaded :

1st. That the demandant is an alien, born out of the allegiance of the late King George the Third, and in a foreign state—to wit, the United States of America; and has not become a subject of the Queen by naturalization or otherwise : verification (no time).

2nd. That said John White was an alien, born in a foreign state, and out of the allegiance of George the Third, (no time laid,) and within a foreign state—to wit, the United States of America; and was not at any time made a subject of the Queen by naturalization : verification.

3rd. *Ne unques* seized.

On the 20th October, 1851, demandant replied to 1st plea that after her marriage with her said husband, and after he became seized of the said land (does not say and while so seized,) and during his lifetime and before this suit—to wit, on the 1st of January, 1841—she became and was and thence continually hath been a subject of this

realm (does not say naturalized,) *absque hoc*, that she is an alien born in foreign parts and is not made a subject of the Queen by naturalization or otherwise, *modo et forma* alleged; to the country and similiter.

To the 2nd, that after her marriage with the said John White and after he became seized (does not say and while he continued seized), and during his life, and before suit—to wit, on the 25th of October, 1850—he became and thence until his death was a subject of this realm (does not say naturalized), without this that he was an alien, born in foreign parts, and was not before or at his death made a subject of the Queen by naturalization or otherwise, *modo et forma* alleged, &c.; to the country and similiter. Verdict for defendant.

Martin, for defendant obtained a rule calling on the tenant to shew cause why the verdict should not be set aside and a new trial had without costs as being perverse, or as contrary to law, evidence, and the charge of the judge who tried the cause upon such terms as the court may think fit. The cause was tried before Mr. Justice McLean at the last Norfolk assizes, when it was proved that John White owned the land out of which the dower is claimed, and was in possession thereof as far back as the year 1824 or 1825, claiming it as his own, and so continued until he parted with the possession.

That White and the demandant came to this province from the United States in or shortly after the year 1820, and continued here until his death.

That on the 23rd October, 1830, John White took the oath of allegiance under the act of 1828, and complied with its provisions in order to be naturalized. That defendant had admitted getting the land from Douglas Barman, who got it from Charles Barman; and that there had been an exchange for it with John White. That a letter demanding dower was delivered at defendant's house in September, 1849.

The defence was rested on the ground that it appeared John White had exchanged the land in question for other land on which the demandant was then living with her

family, and that she could not under such circumstances receive dower out of these lands; but the learned judge ruled that no such defence was pleaded, and that the only issue being alienage, and that the husband was not seized, &c., the demandant was not entitled to recover, seizure and naturalization being proved. The jury however found for the tenant. No deed of exchange seems to have been produced or proved, but the fact was elicited by the demandant herself as an admission of the tenant and his reason for not assigning dower, and the fact does not seem to have been disputed.

McMichael, for tenant, shewed cause and contended, that there was not proof sufficient of the husband's residence in Upper Canada to become naturalized under the act 9 Geo. IV., ch. 21, sec. 2; at all events, that it was doubtful and for the jury. That there was no sufficient proof of seizin, nothing being shewn but bare possession, which, however sufficient to maintain trespass against a wrong-doer, was not so as against the tenant in an action for dower. That no deed or paper title was shown.—*Johnson v. McGill*, 6 U. C. Reports, 194.

Martin, in reply contended that the verdict was perverse and against clear evidence. That in addition to possession it appeared there was a privity, the tenant holding under an exchange between the husband and another of this land for other land, and which exchange constituted the defence, &c.; that there was ample proof of seizin, (*Doe Moffatt v. Scratch*, 5 U. C. R. 351; *Parke on Dower*, 37); that possession is evidence of title; that the husband was clearly naturalized under the statute, and that there should be a new trial without costs, the verdict being against evidence and direction of the learned judge.—*Farrant v. Olmius*, 3 B. & Al., 692.

MACAULAY, C. J.—If it was necessary for the demandant that her husband was here before 1820 to entitle him to the benefit of naturalization under the act 9 Geo. IV., ch. 21, sec. 1, the arguments of the counsel for the tenant would hold good; but he was clearly here on the 1st March, 1828, and for seven years previous, and he took the oath of

allegiance within three years after the passing of the act, viz. after the 7th May, 1828, having taken it in 1830. It seems clear therefore that even if an alien at first he became naturalized from the time of his coming to the country, under the statute. The demandant being also resident in Upper Canada from the year 1820, with her husband, became likewise naturalized under the act without taking the oath of allegiance. The replications to the plea of alienage are not perhaps well framed, but the issues sought to be raised and the substance thereof—namely, naturalization—was proved.

Then, as to seisin, there was sufficient evidence thereof. 10 Went. Pleading, 160, note; Park on Dower, 37; Bell on Property of Husband and Wife, 243.

The alleged exchange was not pleaded as a defence, but the demandant may elect out of which land she will have dower, though not entitled to both; if her possession of the land received in exchange would constitute an election before this action was brought, it is not admissible as a defence on these pleadings; neither is the effect of her election now to be considered.

Co. Lit. 31 b. ib. 50 b; Park on Dower, 261; Roper on Husband and Wife, 379; Park S. 369, S. 319; Bell on Property of Husband and Wife, 245; Crabb on Real Property, S. 1134; 4 Cru. Dig. 434.

McLEAN, J., and SULLIVAN, J., concurred.

Rule absolute.

DOE EX DEM. SHIBLEY V. WALDRON.

Priority of Registry.

A being the patentee of a lot of land, conveyed it in 1838 to B.; B. in 1840 conveyed it to C. without having registered the deed from the patentee to him which was not registered until April, 1843. C. not having registered the deed to him until May, 1845, in September, 1847 conveyed to defendant. In May, 1844, B. executed another conveyance of the property he had already conveyed to C. to the lessors of the plaintiff who registered their deed in February, 1845, thus gaining a priority of registry over C., who did not register his deed until May, 1845.

Held, That it was not necessary that the deed should be registered to pass the title from the patentee to B. and from B. to C., and that the defendant shows either a prima facie title in himself, or that no estate vested in the lessors of the plaintiff.

Ejectment for half an acre, part of lot No. 22 in the 5th concession western boundary, township of Richmond,

specially described in the declaration, which contains two demises—the first laid on the 19th of May, 1844, and the other on the 21st of January, 1851.

In Easter Term last, a rule was obtained by *Kirkpatrick*, for the defendant, calling on the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside, and a new trial be had without costs, as being contrary to law and evidence, and for misdirection.

The cause was tried before Mr. Justice McLean, at the last autumn assizes, held in and for the United Counties of Frontenac, Lennox, and Addington, when the plaintiff recovered, apparently upon the ground that, although he held under a conveyance subsequent in point of execution to that under which the defendant claimed, still the former was first registered, and therefore entitled to priority, and it was inadvertently assumed that they both claimed under a registered title.

The facts, however, seem to be as follows:—On the 21st of February, 1823, the patent issued to Francis McNeil for the south half of lot No. 22, in the 5th concession, western boundary of the township of Richmond, 100 acres, in fee.

On the 24th January, 1838, by indenture of bargain and sale, Francis McNeil, in consideration of £200, conveyed to Lockwood Pringle the S. E. quarter of said lot No. 22, 50 acres, in fee—registered 10th of April, 1843.

At this period, Pringle was in possession, working the land, and supporting Francis McNeil. Matters thus continued until afterwards Lauchlin McNeil, a son of Francis McNeil, took the care of his father, and got possession, and Pringle conveyed to him the above deed from Francis McNeil to him, the same not being then registered, and on the 1st July, 1840, Lockwood Pringle conveyed to Lauchlin McNeil, but this deed was not registered until after the registration of the deed from Pringle to Rogers and Shibley, the lessors of the plaintiff next mentioned. But previous thereto Pringle had resumed possession and again taken charge of Francis McNeil, and had received back the deed which Francis McNeil had made to him, and also the deed which he (Pringle) had made to Lauchlin McNeil.

After which, on the 18th May, 1844, Lockwood Pringle executed an indenture of bargain and sale, in consideration of £25, to Reuben Rogers and John Shibley for half an acre, part of said lot No. 22, specially described, in fee. This is the half acre now in question—memorial registered 10th February, 1845, before the last mentioned deed.

Then, owing to some arrangement between Shibley and Rogers, and between Rogers and defendant, who had entered into possession under them, Lauchlin McNeil, on the 27th September, 1847, executed an indenture of bargain and sale of the said half acre to the defendant, who was then in possession, or Rogers thereupon gave him possession; this was done with Pringle's approbation, to prevent the necessity of registering the deed from him to Rogers and the lessor of plaintiff, and then a second deed from them to defendant. The memorial of this deed was registered the 10th January, 1850.

There was parol evidence that Shibley had relinquished the premises to Rogers, who sold to the defendant, who has a tannery and works of value on the premises. Now Shibley seeks to dispossess him, relying on the deed from Pringle to himself and Rogers as entitled to precedence over the deeds from Pringle to Lauchlin McNeil, and from him to defendant.

It seems therefore that Pringle, holding immediately under the grantee of the Crown under a deed of conveyance not then registered, conveyed to Lauchlin McNeil before the registry of the deed under which he so claimed title, whereby the estate passed to Lauchlin McNeil under the Statute of Uses and the Provincial Statutes; wherefore, Lauchlin McNeil's deed to the defendant will operate in preference to the deed from Pringle to Rogers and Shibley, notwithstanding the registry of the deeds from Francis McNeil to Pringle, and from Pringle to Rogers and Shibley, after Pringle had conveyed to Lauchlin McNeil, but before Lauchlin McNeil had conveyed to the defendant.

Cause was shewn last Term (Michaelmas, 15 Vic.) by *Gildersleeve*, for plaintiff. He contended no legal proof

was given of the execution or existence of any such deed as that spoken of by Pringle in the course of his cross-examination, from Pringle to Lauchlin McNeil nor of any deed from Lauchlin McNeil to the defendant, or that either was founded on valuable consideration. He also questioned how far Lauchlin McNeil could convey any estate in the state of the title and possession at the period the alleged deed was executed.

Kirkpatrick, in reply, contended that the deed was in possession of the plaintiff's attorney at the time of the trial, and that he was entitled to give secondary evidence of it, and did so — *Doe d. Loscombe v. Clifford*, 2 C. & K. 448. That more formal proof was not given, owing to the impression entertained by both the counsel and the court that the deeds operated according to the dates of registry, and that plaintiff was claiming under a registered title and a deed entitled to priority accordingly; that the estate vested in Lauchlin McNeil, and was not divested by any subsequent act.

MACAULAY, C. J.—I think there should be a new trial with costs to abide the event, the verdict having been determined under a misapprehension. It was not necessary that the deeds should be registered to give effect to the Statute of Uses in passing title from Francis McNeil to Pringle and from Pringle to Lauchlin McNeil, nor was registration of those deeds necessary to guard against deeds made by Pringle after registry of Francis McNeil's deed to him; even the cancellation of the deed from Pringle to Lauchlin McNeil would not revest the estate in Pringle, but it does not appear that it was cancelled, and its mere surrender would not have any greater effect than its cancellation; if not, then Pringle had no estate to convey when he executed the deed to Rogers and Shibley. Whether the defendant can prove the alleged deed from Pringle to Lauchlin McNeil, and if he can, whether it can be impeached as fraudulent as suggested on the argument or upon any other ground—or, if valid, whether Lauchlin McNeil had been disseized or was ousted adversely, so that his deed to the defendant was inoperative—and even if so, whether the

plaintiff can establish a right to recover under the deed from Pringle to himself and Rogers as against the defendant—are all matters to be investigated and discussed, if urged, at a future trial. I think—assuming the deeds and their registry to have taken place according to their entry in the registry book—the defendant shows either a *primâ facie* title in himself or that no estate is vested in the lessor of the plaintiff, and that consequently there should be a new trial.

McLEAN, J., and SULLIVAN, J., concurred.

Rule absolute.

HILARY TERM, 15 VIC.

ROBERTSON V. ROSS.

14 & 15 Vic. ch. 66—*To cause of action, and not to amount of damages.*

In an action of assumpsit in the common counts, the defendant was duly notified to attend the trial of the cause as a witness in the behalf of the plaintiff, which he neglected to do; the plaintiff proceeded with the trial of the cause, expecting to prove by the defendant's attorney, that under the defendant's authority, he had offered £20 to compromise the action, which he failed to prove. A verdict was taken for the plaintiff under the Stat. 14 & 15 Vic. ch. 66, pro confesso, and damages were assessed at 1s. *Held*, on an application to increase the verdict to £50, the amount claimed by the plaintiff in his particulars, that the admission is only to be taken as to the cause of action, and not the amount of damages; and that a misunderstanding having arisen as to the offer of £20, the plaintiff was entitled to a new trial, on the ground of surprise on payment of costs.

Assumpsit on the common counts, to which the defendant pleaded the general issue, payment, and set-off.

The case was called on for trial at the January assizes, 1852, held at the city of Toronto, and the jury were sworn, and no one appeared for the defendant. The plaintiff by his particulars claimed £50. A notice requiring the defendant to attend the trial in person as a witness on behalf of the plaintiff, was both proved and admitted to have been served by the plaintiff's attorney on the defendant's attorney, in Toronto, under the statute 14 & 15 Vict. ch. 66, sec. 2, on the 29th of December, 1851, the defendant living in Mulmer, in the county of Simcoe; that when the case was tried on the second Wednesday of the assizes, being the 4th of January, 1852, the defendant had not arrived, and the plaintiff was not prepared with witnesses to prove his case. On the proof and admission of the service of notice on the

defendant's counsel, the plaintiff claimed a verdict for £50, to be taken pro confesso according to the statute. This was overruled by Draper, J., who tried the cause. The defendant's attorney was then called and examined, to prove that under the defendant's authority, he had offered £20 to compromise the action, but he denied being so authorized or having made any such offer, and a verdict of 1s. damages was entered for the plaintiff, with leave to the plaintiff to move the court to increase it to £50, if entitled thereto, under the circumstances.

In Hilary Term last, *Halinan* for plaintiff, obtained a rule calling on the defendant to show cause why the verdict should not be increased to £50, or a new trial be granted, with costs to abide the event. Cause was shown by *Hagarty*, Q. C., during the same term. Affidavits were filed on both sides, from which it appeared the defendant arrived at Toronto the day after the trial, and before the assizes ended, but it was not shown that the plaintiff's attorney was aware of the fact, or that he had been requested to try the case over again by consent. The merits of the plaintiff's demand are asserted on the one side, and denied on the other, and the conflicting nature of the affidavits of the plaintiff's and defendant's attorneys, show that some misapprehension or misunderstanding existed touching the supposed offer of £20.

The defendant's counsel urged the court to suffer the verdict to stand, both parties being indigent, especially the plaintiff, who was unable to pay costs, and the defendant a resident of a remote part of the county, and already subject to a great deal of inconvenience and expense in repeated visits to Toronto, exclusively on the subject of this action, which is brought for wages demanded by a young man, who had been taken as a pauper child and brought up by the defendant.

For the plaintiff, it was contended that the verdict should have been £50 by the effect of the statute, and should now be increased to that amount, the meaning of the case being taken pro confesso extending as well to the amount of damages claimed as to the cause of action; and if not, that was

the impression entertained by the counsel in going on with the trial in the defendant's absence, and that the inadvertence or misconception of the legal effect of the statute on his part should not conclude the plaintiff: that the defendant was guilty of laches in not attending, and cannot now benefit by his own wrong, and that at all events the plaintiff should be so far released as to be allowed a new trial, according to the alternative part of the rule.

MACAULAY, C. J.—The statute 14 & 15 Vic. ch. 66, sec. 2, provides that when one party desires to examine the other, such party shall be subpœnaed, or notice of the intention to examine him, shall be given to such party or his attorney at least 8 days before the time of such examination, and if such party shall not attend upon such notice of subpœna, such non-attendance shall be taken as an admission pro confesso against him in such suit or action, &c. The question is, what is the effect of an admission pro confesso in a suit or action like the present? I apprehend that in equity where a bill for an account or pecuniary demand not ascertained in amount by the nature of the transaction is taken pro confesso, it is nevertheless referred to the master to take the account, &c.; and here I think the admission pro confesso, is only to be taken as to the cause of action, and not the amount of damages; a judgment by nil dicit, or a confession of judgment not including any confession of damages or true debt, but only confessing the action, would not entitle the plaintiff to judgment for the amount of damages laid in the declaration or demanded by the plaintiff's bill of particulars, but that the amount must be proved as upon an assessment of damages. No authority is cited to support the view contended for by the plaintiff's counsel, and I think the ruling of the learned judge at nisi prius quite correct. Had no damages been assessed, it might be a question whether a verdict in entry in favour of the plaintiff, as upon an admission pro confesso, entitled the plaintiff to go down at a future assizes to assess damages; but damages were assessed at 1s., and the present rule is to set it aside. I think the plaintiff may be considered as so far taken by surprise, that it is proper to

grant the application so far as to set aside the verdict on payment of costs.

We cannot try or decide the merits or affidavits; there has been a misunderstanding on the subject, and the defendant did not attend, although notified eight days before the trial; his counsel did not desire to delay the case by reason of distant residence, to prevent the case being taken pro confesso against him; and had Mr. Crawford's evidence amounted to what Mr. Hallinan, as his affidavit states, he expected it would, damages would have been assessed at £20. If the defendant assents to their increase to £20, the rule may be so modified; if not, I think the plaintiff may fairly claim a new trial on the terms of paying costs. The rule will therefore be absolute to set aside the verdict and for a new trial on payment of costs.

McLEAN, J., and SULLIVAN, J., concurred.

Rule absolute on payment of costs.

STEPHENSON V. RANNEY.

Agreement to manufacture wheat into flour.

The plaintiff having purchased a quantity of wheat, entered into an agreement with the defendant that, on condition of the plaintiff delivering to the defendant wheat of the same quality as the sample previously shown to defendant, to be ground into flour, the defendant agreed to manufacture the said wheat into flour, and for every four bushels and forty pounds of wheat, of the quality and according to the sample received, he would deliver one barrel of flour, which should pass inspection as superfine at Montreal.

Held, That the contract was not a contract for the sale of the wheat, but an agreement to manufacture for the plaintiff the identical wheat delivered into flour.

That it was a condition precedent, on the plaintiff's part, that the wheat delivered should be of the same quality as the sample;

That the acceptance of the wheat by the defendant, and his manufacturing it into flour, did not cause the rules prevailing between vendor and vendee to apply with equal force in this case as in the case of an absolute sale, to conclude the defendant from afterwards disputing the correspondence of the wheat delivered with the sample;

That, where a jury gives a greater verdict than is warranted by the evidence and data by which they ought to have been guided, the court will, where the amount is mere matter of computation, direct a verdict for the plaintiff for the correct amount, or grant a new trial on payment of costs.

Declaration, 1st September, 1851. First count states that, to wit, on the 31st January, 1851, it was agreed between the plaintiff and defendant that in consideration the plaintiff would deliver the defendant, at the mills of defendant at St. Catharines, as soon after the opening of the navigation as possible after the day aforesaid, to wit, 5000 bushels of

fall wheat of good quality and according to the sample shewn to defendant by plaintiff, to be ground into flour, he (the defendant) would manufacture the said quantity of wheat into flour for the plaintiff, and for every $4\frac{4}{6}\%$ bushels of wheat of the quality and according to the sample aforesaid, so to be delivered by the plaintiff to defendant as aforesaid, would deliver to the plaintiff one barrel of flour, which should stand and pass inspection as and for superfine flour (in second count No. 1,) in Montreal, Quebec, or New York market, free of charge to the plaintiff, on board any vessel in which such flour should be shipped, to be conveyed from St. Catharines aforesaid to or towards the destination thereof. And the plaintiff says, that afterwards—to wit, on the 21st April, 1851—and as soon after the navigation as possible, &c., he (plaintiff,) under and in pursuance of said agreement, delivered to defendant, at his mills aforesaid, a large quantity, to wit, 5000 bushels, of fall wheat of good quality, to wit, of the quality and according to the sample aforesaid, to be manufactured into flour of the quality aforesaid, and defendant then and there accepted and received the said wheat from the said plaintiff for the purpose, upon the terms, and under the agreement aforesaid. And the plaintiff says that the defendant did not, although the same could, and might, and ought to have been done, deliver to the said plaintiff one barrel of flour for every $4\frac{4}{6}\%$ bushels of wheat so delivered to defendant as aforesaid to be manufactured into flour, but a much less quantity, to wit, one hundred barrels less than he ought to have done; by means whereof plaintiff hath sustained great loss and injury.

Second count same as the last to the breach, and then for breach alleges, that although the same could, and might, and ought to have been done, the defendant did not deliver to plaintiff one barrel of superfine flour No. 1, for every $4\frac{4}{6}\%$ bushels of wheat so delivered to defendant as aforesaid to be manufactured into flour, but a much less quantity, to wit, one hundred barrels less than he ought to have done, by means whereof, &c.

Third count same as first and second to the breach, and then proceeds. And although defendant did deliver a large

quantity—to wit, nine hundred barrels of flour, as and for superfine flour No. 1, as aforesaid, and although defendant did, within a reasonable time, send such flour to Montreal to be inspected, yet, though inspected, it did not stand and pass inspection as for superfine flour No. 1 in that market, but as for flour of a very inferior quality, to wit, superfine flour No. 2—of all which defendant had notice; whereas plaintiff lost great gains, &c.

Fourth count, £300 goods sold and delivered, money paid, and money had and received. Damages laid at £300.

Pleas—1st September, 1851: 1st, non-assumpsit.

2nd, To the first count—that plaintiff did not deliver to defendant, nor did he receive from plaintiff, wheat of the quality or kind in said first count mentioned: concluding to the country and issue.

3rd, To second count—similar to the last.

4th, To third count—similar to the last.

5th, To third count—that the flour which defendant delivered to plaintiff, and therein referred to, did pass and stand inspection as and for superfine flour No. 1 in Montreal market; concluding to the country and issue. Verdict for the plaintiff, and £300 14s. 9d. damages.

At the trial before McLean, J., at the last fall assizes held in and for the United Counties of Wentworth and Halton, the following correspondence was given in evidence to prove the contract, &c.: On the 21st January, 1851, the plaintiff wrote to the defendant that he had on hand 5000 bushels of good quality red wheat, which he thought of getting manufactured in spring; that the Mutual Mills would grind at $4\frac{4}{80}$, but if he (defendant) would do it at the same, in the event of his (plaintiff's) deciding to have it ground, he would give the defendant the preference.

On the 29th of January, the plaintiff wrote to the defendant, referring to the above and their subsequent conversation, that he had decided to give the defendant the grinding of the wheat mentioned, understanding the conditions to be, that as soon after the opening of the navigation as possible—fire and other accidents excepted—he (plaintiff) would deliver to the defendant, at St. Catharines, 5000 bushels of

of fall wheat, and for every 4½ bushels of wheat, the defendant would deliver free on board at St. Catharines, to the plaintiff's order, one barrel of flour of the Merchants' Mills brand, and warrant same to inspect No. 1 superfine in Montreal, Quebec, or New York. Any further lot he might send, to be ground on the same terms.

On the 31st of January, 1851, the defendant wrote to the plaintiff, in reply to the above letter of the 27th January, that he would manufacture the quantity of wheat mentioned, or any further shipment, on the terms mentioned—say for every 4½ bushels of the quality shewn him (defendant) in his office, delivered at the defendant's mills, free on board vessel, one barrel S. F. flour, guaranteed to inspect as such in Montreal, Quebec, or New York—and requesting the plaintiff to keep the sample wheat for their mutual reference in case it should be necessary to compare it with the cargo when it arrived, adding that the Merchant's Mills were Mr. Philips's, and his (defendant's), Union and Welland.

On the 22nd April, 1851, defendant wrote to plaintiff that the vessel had arrived the day before, and discharged 5000 bushels of wheat which he had not seen, and therefore could not speak of the quality. On the 26th April, 1851, defendant wrote to plaintiff that his miller had informed him the wheat was rather damp and very smutty, so much so that it was impossible to make flour of a good colour; that he (the miller) thought it would take at least five bushels to make a barrel of flour that would pass inspection; that he (defendant) had not had time to examine into the matter himself, but thought it best to drop the plaintiff a line on the subject; that, if the wheat was such as the miller represented, he (defendant) would decline grinding any more of it upon any terms whatever, as the reputation of his mills was of far more consequence than the profit to be derived in manufacturing from wheat even at a liberal allowance for want of quality.

On the 28th April, the plaintiff wrote to defendant, that should the quality of the wheat not turn out as the sample shown, he would require to know, as it was purchased from sample, which sample was still in his office at Hamilton, and

had been exhibited to defendant when they made the bargain. He then mentioned his having purchased 9000 bushels more wheat, on the strength of their subsequent conversations, which he had ordered to be shipped to defendant, adding, in a postscript, that as soon as the defendant had the wheat ground to let him (plaintiff) know, and he would give directions as to shipment to Montreal by defendant's steamer, and that he would like it sent soon.

On the 10th of May, the plaintiff wrote to defendant requesting to know the exact quantity of flour he then held manufactured for him (plaintiff,) and the charges to Montreal, &c., adding, that the quantity, according to their terms of contract, he (plaintiff) made out to be 1084 barrels 80 lbs., and desiring to know whether the defendant would take the second cargo then on its way to his mills.

On the 19th May, the defendant at St. Catharines wrote to plaintiff at Hamilton, that he (the plaintiff) would receive therewith a sample of the flour made from the wheat; that it was the best he could do, for the wheat was in such a damp state that it was impossible to clear it of smut, and consequently the flour was very dark; that the flour had been ready some time, and could be shipped to Montreal at 1s. 3d. per barrel. He then advised the plaintiff to send the rest of the wheat to Montreal and sell it there, for that, unless it was dry, he could get no better flour made from it than the sample then sent; that he (defendant) was sorry for plaintiff's sake as well as his own, for had the wheat been dry, some good might have been done.

On the said 19th of May, the plaintiff at Hamilton wrote to the defendant at St. Catharines, to the effect that the letter would be handed him by Mr. Hutchinson, from his office, who would attend to the shipping of the flour, he (the defendant) had made of the Goderich wheat; that the sample he had sent him, reached him too late to enable him to judge of the quality, and therefore act principally upon your own report; that Mr. Hutchinson was fully empowered by him to grant receipts and otherwise act for him.

On the 21st of May, 1851, the plaintiff at Hamilton, wrote the defendant at St. Catharines, that he was advised of the

vessel having left Goderich with a cargo of wheat for defendant's mill, and requested the defendant immediately on her arrival to apprise him, and *not to receive* the cargo until he had time to be with him to examine the wheat.

On the 27th of June the plaintiff wrote to the defendant that he learnt from Montreal that the flour shipped by the plaintiff at St. Catharines on the 27th and 30th ultimo, under our contract, amounting to 1012 barrels, had arrived and remained undisposed of, and was then in store at Montreal for further orders—the inspector having reported an inferior brand to that which was guaranteed by the plaintiff; that plaintiff did not hold himself responsible for the further disposal of the flour, but would be most happy to afford defendant any assistance in his power to dispose of it to the best advantage; that 215 barrels of the flour had been lost and was protected by the insurance, leaving 797 barrels subject to the defendant's instructions, and that plaintiff would be glad to receive any suggestions from him as to the method of proceeding with the sale.

On the same day, the defendant wrote the plaintiff, acknowledging the receipt of the last mentioned letter, and said, in reply, that if the flour manufactured from his (the plaintiff's) wheat did not inspect No. 1, it was no fault of the defendant, but of the wheat the plaintiff had sent him, and that as he had never had any ownership in the property, he did not feel inclined to assume it at that late day; that his instructions to his miller were, to make the best article he could, without reference to the defendant's interest in the yield, which he told defendant he had done; that had the wheat been as dry as the sample shown him at the plaintiff's office, he thought the flour would have passed as No. 1—at any rate, that he would have felt bound to make good his contract; that it was usual, when grinding on commission, to turn out flour made from the identical wheat left with “us,” which defendant had done in that case, and that the plaintiff could hardly expect him to do more.

On the 30th of June the plaintiff wrote to the defendant, annexing a copy of a letter which he had addressed to

Messrs. Holmes, Knapp & Co., of Montreal, respecting the flour referred to in his letter of the 27th instant, just received; that as it was his intention, should the deficiency anticipated in his (the plaintiff's) letter arise, to claim from the defendant the entire amount thereof, he requested, should the defendant have any suggestions to make respecting the disposal of the flour, that he would communicate the same to Messrs. Holmes, Knapp & Co., for their guidance. The letter referred to was written to Holmes, Knapp & Co., and directed a sale of the flour to the best advantage for the benefit of all concerned. It speaks of the flour as received by them about the end of the previous month of May, and of his intention to look to the defendant for any deficiency of price, &c.

On the 21st of July, Mr. Macara, the plaintiff's attorney, wrote to the defendant proposing some concerted arrangement for the disposal of the flour, and informing defendant that the plaintiff looked to him for indemnity.

The plaintiff also gave evidence to shew that the wheat delivered corresponded with the sample :

1st, The evidence of Wyatt, a clerk of his, who purchased the wheat, and who said that he had bought the wheat, which was red fall wheat, at Goderich, in January last, in two lots of 3000 and 2000 bushels respectively, from both of which the sample—which was produced at the trial—had been taken, the prices being 68 and 70 cents per bushel; that the bulk was equal to the sample in which there was some smut, and which he thought was deteriorated from keeping.

2nd, Rhynas, another witness, was called to prove the sample sent by Wyatt was the same shown to the defendant in the plaintiff's office at Hamilton, in January.

3rd, Christopher Crabb, who had sold the wheat to the plaintiff, corroborated Wyatt's testimony, and showed the whole quantity was fully equal to the sample; that the wheat was perfectly free from damp in his store; that he saw it shipped on the 10th of April in good order, and he saw it delivered at defendant's mill in as good order as when shipped; that defendant's miller received it, only

complaining that it was a little smutty, but the defendant was not present; that on the next day, however, on presentation of the miller's receipt to him, he paid the freight without objection; the witness denied that there was any difficulty between himself and the plaintiff about the wheat, although an action had been brought against him by the plaintiff, for what he did not know.

The plaintiff then put in a commission of interrogatories executed at Montreal, the receipt of which was objected to on the ground that the plaintiff's name being "Pillans Scarth Stevenson," the name in the commission or some of the proceedings was "Pillans S. Stevenson," and was therefore a misnomer or variance. In the commission, the name is "Scarth" in full, and so in the interrogatories and affidavits and notice thereto annexed, but the name "Pillans S. Stevenson, plaintiff" is written in the title of the answers; it, however, refers to the annexed commission, notice and interrogatories for the plaintiff. The affidavit of the execution of the commission is also entitled with the initial "S." only, but "the said plaintiff" is added, and in the body of it it refers to "the annexed commission" and "interrogatories annexed," and verifies the answers of the witness named therein as made to such interrogatories. Several witnesses, including the consignee, inspector, and broker, were examined under this commission to prove the receipt of the flour at Montreal, branded with the defendant's brand "S. Fine, John L. Ranney, St. Catharines," and the two bills of lading annexed to the answers as being for 797 barrels; also, that superfine was in the trade understood to mean superfine No. 1, being synonymous; also the bad quality of the flour, that it was even of a poor quality of superfine No. 2, and that No. 2 would not be received as answering a contract for superfine; but neither the inspector, although strong in classing the flour as No. 2, does not, nor do any other of the witnesses, explain wherein it was defective in quality to answer No. 1 or superfine, probably because the question was not asked in the interrogatories; that it sold in July for 576*l.* 11*s.* 11*d.* exclusive of charges, amounting to 128*l.* Evidence was also given of the market prices of

superfine flour Nos. 1 and 2 in the Montreal market at the period this flour was inspected, the price for No. 1 being 20s. and 20s. 3d., and for No. 2, 19s. 3d. and 19s. 6d., the price actually obtained for the flour being about 17s. 8d.

The plaintiff proved that he had contracted to sell at Montreal 1000 barrels of this flour at 20s. 4½d., but the declaration does not claim special damages on that account. The plaintiff appeared to have received 1012 barrels in all, whereas the quantity of wheat delivered, 5060 bushels, entitled him according to the contract to 1084, being a deficiency of 72 barrels, accounted for perhaps by the suggestion that it took 5 bushels to make one barrel of flour, in which event the whole quantity of wheat delivered would only make 1012 barrels.

On the defence, the miller who received the wheat and another miller was called, also a third witness. The first witness represented that a barrel of superfine flour might be made out of 4 bushels and $\frac{40}{60}$ or $\frac{2}{3}$ of wheat. That the defendant was not at home when the wheat was received, but had left directions; that it was pretty damp and a good deal of smut in it—a great deal more smut and dust of all kinds in it than in the sample produced; that it was a good plump grain, and good to grind had it been dry and free from smut; that smutty wheat becomes worse by moving; that the smut is broken and adheres to the grain by damp, and that a smut machine cannot clean it effectually; that wheat requires to be often moved to prevent damp; that damp lessens the quantity of flour and smut darkens it; that defendant was told that it would take five bushels to a barrel; that No. 1 superfine could not be made of the plaintiff's wheat in the condition it was; that the miller did all he could, and took every pains to make the flour stand inspection No. 1; that complaint was made to the master of the vessel that the wheat was damp; that it was branded superfine by the defendant's order; that he had no other brand and gave no orders to the contrary, but was told the wheat would not make superfine flour; that the defendant's mill was one of the best in Canada.

The second witness stated that the wheat was damp,

smutty, and full of sticks, and the sample did not look like it, that it was not in as good condition as the sample ; that the smut could not be removed by any machinery in the mill, and that the defendant's smut and cleaning machine are allowed to be the best on the Welland Canal ; that the wheat was not of a good quality for grinding, and that superfine flour could not be made from it ; that as much was made as could be made, and of as good quality.

The third witness stated that it was the worst description of wheat that he (a mill owner) ever saw delivered in a mill to be manufactured, and would not make No. 1 superfine owing to the smut, which by reason of the damp would stick to the grain and give the flour a bluish cast : that no great quantity would mix by putting one parcel over another, though it would to some extent ; that this wheat was deposited in a bin capable of holding 6000 bushels, and that after about 1500 bushels of it, or about 260 barrels of flour had been ground, about 3000 bushels of defendant's wheat was placed on the top of the residue in the bin ; that the wheat was drawn out for grinding near the centre and bottom of the bin, and some of the defendant's wheat, to the supposed extent of 200 bushels, was ground up with the plaintiff's, and that owing to the intermixture the exact quantity of flour produced from the plaintiff's wheat could not be ascertained ; that the defendant's wheat was from Brantford, was dry and of good quality and turned out superfine flour No. 1.

In Michaelmas term last *Vankoughnet*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and new trial be had, on the grounds, 1st, of misdirection ; 2nd, that the verdict is contrary to law and evidence ; 3rd, of excessive damages ; 4th, of the reception of improper evidence ; 5th, on affidavits and papers filed. The object of the last being to shew that on the 28th of August the plaintiff issued a writ against Crabb, and on the 11th of September declared for damages in relation to the wheat now in question, as not corresponding with the sample. It does not shew the wheat to be identical ; the time and place of purchase and quality corres-

pond; and there was no evidence that the plaintiff had bought other wheat of Crabb, but there was evidence that the plaintiff had bought a large quantity of additional wheat, which was shipped from Goderich and by the same vessel that had carried the cargo received by the defendant.

Cameron, Q. C., shewed cause during the same term, and contended that it was a transaction of goods sold and delivered, a contract of sale or barter, the plaintiff selling and the defendant purchasing so much wheat, and undertaking to pay for the same by delivering flour of a certain quality in return, in the proportion of one barrel to every 4 bushels and 40 lbs. of wheat received—that is, to manufacture the same on certain terms by which he was to be remunerated thereout and to return the residue in flour of the quality superfine; consequently that the defendant, having accepted the wheat with an opportunity of inspection, made it his own property, and concluded himself from afterwards disputing its quality or correspondence with the sample.—*Dawson v. Collis*, 20 L. J. C. P. 116; *Gilliad v. Roberts*, 19 L. J. Ex. 410; *Chapman v. Morton*, 11 M. & W. 534; *Edan v. Dunfield*, 1 Q. B. 302; *Richardson v. Dunn*, 2 Q. B. 218; *Coleman v. Gibson*, 1 Moo. & Rob. 168; that the defendant admits notice of the alleged dampness, and yet did not reject, but accepted the wheat; and that at all events it was a question for the jury on a distinct issue, whether the wheat delivered did answer the sample or not, and that on conflicting evidence they find that it did: that no new evidence has been discovered, and no ground exists for a second trial on the same evidence: that there was no misdirection—the defendant's conduct in accepting the wheat, mixing other wheat with it, branding the barrels superfine, not delivering the full quantity of flour, &c., constituted matter material, and properly dwelt upon in the learned judge's charge to the jury on the issue respecting the correspondence of the wheat with the sample, and that it was not ruled to estop the plaintiff, nor withdrawn from the jury, but was left to them with the other evidence; that the alleged misnomer

or variance in the name of one of the parties in some of the proceedings under the commission was immaterial.

Vankoughnet, Q. C., in reply, contended that it was a dry commercial question, and the contract not one of sale or barter, but an executory one to manufacture the identical wheat delivered, and return the flour made thereout, as the declaration and letters in evidence show: that such a contract differs materially from one of absolute sale by sample as respects the leading effect of the defendant's acceptance, &c., that it was treated as a transaction of sale at the trial, and left to the jury by the learned judge with reference to the law on the subject of sales by sample, which is more stringent respecting the effect of acceptance and non-repudiation than under an agreement to grind certain wheat of a prescribed quality on specified terms; that a misapprehension existed or might have been created in the minds of the jury by the stress laid by the learned judge respecting the defendant's conduct as having accepted and not rejected, having branded the flour barrels superfine, having mixed his own wheat with the plaintiff's, and seemingly converted some of it to his own use, &c., which constitutes misdirection sufficient to claim a new trial on the defendant's part—*Toulmin v. Hedley*, 2 C. & K. 157; that defendant gave prompt notice of the wheat being smutty and damp; that the plaintiff's reply evidently contemplated his grinding it, notwithstanding, and that when ground, the defendant transmitted a sample of the flour, so that the plaintiff was not kept in the dark, nor could he have been misled by the brand as to its actual quality: that the mixture of Brantford wheat with the plaintiff's could not have deteriorated the quality of the flour, as all the evidence on that head went to prove: that the whole question was, whether the wheat corresponded with the sample, and that defendant having received and ground it, not only ought not to conclude or estop him on that point, but that the result proved that the wheat could not have corresponded with the sample, if as admitted, flour of the quality promised could have been made out of the sample shown; that the only defect imputed to the flour delivered, was the colour which

arose entirely from the effects of the dampness complained of upon the smut, with which the wheat was confessedly more or less injured, and which smut could not in consequence be effectually removed by any machinery or process that could have been contemplated by the parties in making the contract; that the cases cited, do not apply to contracts like the present; that the question is, not whether the defendant is concluded or estopped as to the fact of quality, but what the fact was; and that too much stress was laid upon his acts, &c., as estopping him upon what really was an open question of disputed fact. *Varicas v. French*, 2 C. & K. 1008, as to the requisite proof of absence of witnesses examined under a commission to let in their answers to the interrogatives.

MACAULAY, C. J.—The defendant is a mill owner living at St. Catharines, on the Welland Canal; the plaintiff is a merchant living at Hamilton, who had purchased a large quantity of wheat at Goderich, which was to be conveyed by water from thence through Lakes Huron, St. Clair, Erie, and the Welland Canal to the defendant's mill at St. Catharines.

If, as contended by the plaintiff's counsel, the contract constituted a transaction of sale so that the right of property in the wheat passed to the defendant as vendee of the plaintiff's, the cases cited show that after acceptance, with previous opportunity of inspection and rejection, if it did not answer the sample, the defendant could not rescind the sale or resist an action for the price agreed upon on the ground that it did not correspond with the sample, whatever remedy he might have by cross action founded on the implied warranty that it should so correspond, or in proving the breach of warranty in mitigation of damages—*Sheet v. Blay*, 2 B. & Ad. 456; *Valpy v. Gibson*, 4 C. B. 837, 849; *Toulmin v. Hedley*, 2 C. & K. 157; *Dawson v. Collis*, 20 L. J. C. P. 116. In a sale by sample, there is an implied warranty of correspondence, and the buyer is not estopped by acceptance, except from denying the sale; he may, adopting it, sue for the breach of such warranty.—*Parkinson v. Lee*, 2 East. 321;

321; Parker v. Palmer, 2 B. & A. 387; Ch. jr. Form, 188; 3 Star. N. P. C. 32 and note; Sinclair v. Bowles, 9 B. & C. 92; Harrison v. Luke, 14 M. & W. 139; Hutchinson v. Bowker, 5 M. & W. 535—construction of the word “fine;” equally so where flour of a certain quality is to be returned from wheat answering a certain sample, it is a condition precedent, and has been so treated in the present case. Now, although there is some ambiguity in the letters as to the precise nature of the contract, I think the substance of it was that the defendant was to manufacture the wheat received, and return the flour made therewith to the plaintiff; that, if it corresponded with the sample the defendant was bound to return superfine flour; if not, the first failure was on the plaintiff’s part, and the defendant’s obligation never arose. If defendant was estopped by acceptance, it should have been relied on in pleading, but issue having been taken on the point of quality of the wheat, the conduct of the parties merely constituted evidence, and however stringent, for the jury.—Poulton v. Lattimore, 9 B. & C. 259; Hopkins v. Appleby, 1 Star. 477; Groning v. Mendham, 1 Star. 257, 4 Tyr. 911, 5 Tyr. 538; Chapman v. Morton, 11 M. & W. 534, 20 L. J. C. P. 117.

In the view contended for by the plaintiff’s counsel it would have formed a transaction of barter, and the wheat on delivery would have become the defendant’s property and at his risk, with permission to deliver in return any flour of the quality agreed upon (a); but I cannot look upon it in that light. The declaration describes it as an agreement whereby on condition of the plaintiff’s delivering to the defendant wheat of the *quality and according to the sample shown to be ground into flour*, the defendant agreed to *manufacture the said wheat into flour*, and for every 4 bushels and 40 lbs. of the quality and according to the sample received he would deliver one barrel of flour which should pass inspection superfine (b) in Montreal, &c. Then the plaintiff avers the delivery of 5000 bushels of wheat of the *quality and according to the sample to be manufactured*

(a) Harrison v. Luke.

(b) Hutchinson v. Bowker.

into flour of the quality aforesaid, and that the defendant accepted and received the same for that purpose. The breaches assigned are the non-delivery of a part of the flour, and that the residue would not pass inspection, &c. The letters offered in evidence to establish this contract against the plea of non-assumpsit show, that in the first place the plaintiff wrote to the defendant that he had 5000 bushels of good red wheat which he thought of getting manufactured, and that in the event of his deciding *to have it ground*, he was disposed to give the defendant the preference; after a personal interview, he wrote again to say that he had decided to give the defendant the *grinding of the wheat*, understanding the conditions to be that he was to deliver 5000 bushels &c. of wheat, for every $4\frac{2}{3}$ bushels of which the defendant would deliver to the plaintiff one barrel of flour warranted to inspect No. 1 superfine at Montreal, and any further lot he might send to be ground on the same conditions; to which the defendant replied that he would manufacture the quantity of wheat on the terms mentioned, i. e., for every $4\frac{2}{3}$ bushels of the quality shown him one barrel of superfine flour guaranteed to inspect as such, &c., and requesting the plaintiff to keep the sample for mutual reference, in case it should be necessary to compare it with the cargo, when it arrived; no time having been fixed for the delivery of the flour. These letters contain the contract. After the arrival of the wheat the defendant wrote the plaintiff to say his miller informed him that the wheat was rather damp and very smutty, so much so that it was impossible to make flour of a *good color*; also, that if it was such wheat as the miller represented, he would decline grinding any more on any terms, the reputation of his mills being more important than the profits to be derived from manufacturing from wheat even at a liberal allowance for want of quality. The plaintiff replied that, should the quality of the wheat not turn out as the sample shown, he would require to know, as it was purchased by such sample, adding in a postscript as soon as the defendant had the wheat ground to let him know, and he would give directions as to shipment to Montreal; afterwards the plaintiff wrote to the

defendant requesting to know the exact quantity of the flour he then held manufactured for him, &c. Afterwards the defendant wrote to the plaintiff, transmitting a sample of the flour made from the wheat, as the best he could do, the wheat being so damp that it was impossible to clear it of smut, and consequently the flour was very dark, and advising him to send the rest of his wheat to Montreal, &c. On the same day the plaintiff replied that the bearer of that letter would attend to the shipping of the flour which the defendant had made of the Goderich wheat, &c. After the flour had been inspected in Montreal the plaintiff wrote to the defendant throwing it upon his hands, and in reply the defendant, attributing the fault to the wheat, and denying previous ownership, declined to assume it. The whole tenor of the correspondence subsequent to the making of the contract shows the understanding of the parties, that the wheat was delivered not on an executed contract of goods sold and delivered, but upon an executory agreement, to be manufactured for the plaintiff on certain specified terms. Neither the declaration nor the letters speak of selling, but merely of delivering the wheat, and the construction contended for would not support the contract as laid in the declaration. Had it been a mere case of barter, the plaintiff might have demanded the flour upon the delivery of the wheat and before it was ground. No time was appointed for delivering the flour as there was of the wheat; and the parties evidently contemplated a reasonable time being allowed to enable the defendant to manufacture and convert the wheat into flour. The transaction might be tested by asking at whose risk the wheat was before being ground, who would have sustained the loss had the mill been burnt? in whom was the right of property? could the plaintiff have demanded its re-delivery before being ground? or could he have maintained trover if refused? or could he have maintained trover against a wrongdoer, had one converted it wrongfully. It appears to me the wheat remained the property and was at the risk of the plaintiff, unless the defendant, as the miller, was legally responsible as an insurer for its safe keeping, and that the flour was his also,

so that neither the wheat nor the flour could have been sold under an execution against the defendant's goods, nor would a purchaser from the defendant with a knowledge of the facts acquire a valid title to the property.

When a contract is equivocal in its terms the substance is to be looked to, and I think the substance of the present one was that one party should deliver grain to the other, a mill owner, to be manufactured into flour, the miller not being remunerated by toll under the stat. 32 Geo. III., ch. 7, but in the manner specially agreed upon; such being the nature of the contract, it seems to me it was a condition precedent on the plaintiff's part that the wheat delivered should be of the prescribed quality, and being so averred and the averment being traversed by the 2nd plea, it was of course a matter for the jury under the evidence, unless defendant was estopped. Some of the cases shew that where upon a sale by sample the vendee has had an opportunity to inspect the article delivered and has unequivocally accepted it and converted it to his own use, not only does the property pass, &c., but he is liable to be concluded by his conduct from afterwards disputing the correspondence of the goods with the sample, such as *Poulton v. Lattimore*, 9 B. C. 259; *Hopkins v. Appleby*; 1 Star. N. P. C. 477.—It will however be found in other cases of sale by sample, which involves an implied warranty, that the bulk corresponds therewith, the vendee may accept and retain the goods, and either bring an action for the breach of such warranty or resist an action for the price, by showing it in mitigation of damages; but in such case it seems to be expected (if not decided) he must give prompt notice of the deficiency, not upon the ground that the vendor may elect to take back the goods and rescind the bargain, or that the vendee's notice impliedly offers to return and rescind on his part, for it might be very inconvenient and even impossible for him to do so, but rather at the peril of being held concluded in evidence, from setting up such a case, after unreasonably delaying notice and as it were evincing by his silence a tacit acquiescence in the fulfilment of the contract by the vendor. In the present case it

was contended by the plaintiff that the defendant was liable to be bound by his acceptance, silence, and conduct, as strongly as a vendee or purchaser—a proposition controverted on the other side. In my opinion the rules prevailing between vendor and vendee upon sales by sample do not apply with equal force, for here the property was not to become the defendant's, but it was to remain the plaintiff's, and the defendant was only to do something upon it for him. The quality of the flour necessarily depended upon the quality of the wheat, and if in truth the quality of the wheat was inferior, it did not impose upon the defendant the burthen of returning flour of a quality superior to what it would make; no dispute exists respecting the meaning of the word superfine as compared with No. 1 superfine, if it did, the case of *Hutchinson v. Bowker*, 5 M. & W. 335, would be applicable; it may also be observed that the evidence does not show on what particular ground it was that the flour did not pass inspection; apparently the only fault found with it was its colour.

The evidence raised two questions for the jury; 1st, whether the bulk did correspond with the sample; and if not, 2nd, whether the defendant had waived the objection. *Alexander v. Gardner*; 1 Bing. N. S. 671. To prove the affirmative the plaintiff called as a witness the person from whom he purchased the wheat and who accompanied it to the defendant's mill, and who asserted positively that it did correspond with the sample and was not affected by damp or smut to a greater degree; he relied also on the defendant's receipt of the wheat, the qualified terms on which he wrote respecting it on its arrival, such terms implying a further communication if his own inspection confirmed the report of the miller, and yet nothing further being said, the mixing of other wheat with the plaintiff's whereby its identity was lost, and flour of inferior wheat might thereby have been substituted; that the brand "superfine" stamped on the barrels was equal to a declaration by the defendant to the plaintiff and all the world that it was such flour as that brand imported. As to the important fact against the defendant of his having deposited other wheat of his

own upon the plaintiff's, and thereby causing inevitably more or less mixture, the authorities noted hereafter may be referred to, although some of them go to extreme, and probably such unreasonable lengths as not to be adopted as sound law.—20 Vin. Ab. 515 (13) (14). If I have a heap of grain or money and another comes and casts his grain or money into my heap, I may justify the carrying away all, because otherwise he will by his tort bar me to take my own goods.—1 Roll. Ab. 566; 18 Vin. Ab. E., 6, 7, 8. If A. and B. are playing, and A. intermingles his money in B.'s heap of money, B. shall now have all, &c.—1 Roll. R. 133 (12) S. C.; *Fellows v. Mitchell*, 2 Ver. 516; *Best v. Jolly*, Sid. 38; *Douglass v. Kendall*, Bull. 95; *Richardson v. Atkinson*, 1 Stra. 576; *Philpott v. Kelley*, 3 A. & E. 106. The evidence as to the quality of the wheat was contradicted by the evidence of the defendant's millers, who stated that it was damp and smutty, and incapable of being made into flour of the quality agreed upon, that it did not correspond with the sample which was exhibited to them at the trial.

The defendant also relied on his having given prompt notice to the plaintiff that the wheat was inferior; that the plaintiff, who had the sample, took no steps to compare it with the bulk, nor did he countermand the grinding of it, but in reply to the defendant's notice expressed himself in terms importing his expectation that the wheat was to be ground; that his expression in his letter of the 26th of April, "should the wheat not *turn out* as the sample shown, he would require to know," was equivocal, as the words "*turn out*" might relate to an expected examination by the defendant personally, or to the flour to be produced on grinding the wheat; and that on the 10th of May, only twelve days afterwards, the plaintiff wrote in terms indicating his supposition that the wheat had in the meantime been all ground into flour, as it seemingly had been; that the defendant's letter of the 26th of April informed him that, in the opinion of a competent judge, the wheat would not make flour of a *good colour*; that upon its being ground he sent the plaintiff a sample of the flour, saying, that owing

to its dampness the wheat could not be cleaned of the smut, and that the flour was consequently very dark, and that no other ground was suggested for its not passing inspection except the colour; that therefor the plaintiff had notice, both upon the arrival of the wheat and upon its manufacture into flour, that it could not be equal to the sample; that, if such sample would have made superior flour, it was as much the duty of the plaintiff as of the defendant to test the wheat before grinding, by comparison with the sample; that the brand on the flour barrels could not have misled the plaintiff, a sample of the flour having been shown him, and the whole being liable to inspection when sent to market; that the plaintiff, without objection or remonstrance, sent an agent to receive it and forward it to Montreal, being on his part quite as much an acceptance of the flour as had been the defendant's acceptance of the wheat; that neither was conclusive, because the flour was to be subjected to inspection at Montreal, and the quality of the wheat to be virtually decided thereby; that the deposit of the defendant's wheat in the bin with the plaintiff's could only have caused a partial admixture, and that it was of undoubted quality; that the main quantity of the flour delivered was from the identical wheat received, and the remainder so far as mixed was from wheat of a better description; that the plaintiff does not complain of other inferior wheat or flour being substituted, and that the result of the inspection conclusively established the inferiority of the wheat to make flour of a proper colour, and that the just inference was that it did not correspond with the sample which both parties were satisfied would make flour of the desired quality.

Of course the defendant's omission to cause a careful inspection before grinding—in not giving a more distinct notice—in not standing upon the objection and asking for further directions from the plaintiff—his mixing other wheat with the plaintiff's, and thus confusing the heap and rendering discrimination impossible—branding and delivering the flour as superfine—were strong circumstances against him, and in favour of the plaintiff's right to hold him bound

to fulfil his part of the agreement strictly. They were all proper for the jury in connection with the oral evidence, as tending to the conclusion that the wheat was of the required quality, or had been adopted by the defendant as such, waiving any objection on the ground of dampness, which seems to have been the principal or only substantial difference alleged—the sample being smutty as well as the bulk, and the loose dirt in the latter being naturally expected to be readily separated in the cleansing process the grain was to undergo before grinding. On the other hand, the fact of actual dampness and its effect in rendering it impossible to divest the grain of smut—the notice thereof to the plaintiff—the undoubted fact that the flour, owing to its colour indicating smut, failed to pass inspection, tended strongly to the conclusion that the wheat was insufficient to make superfine flour of the quality agreed upon; that it was inferior to the sample and had not been accepted and ground up by the defendant as corresponding therewith, or as capable of turning out better flour than it did, there was conflicting evidence, direct and circumstantial, on both sides, and it was for the jury to decide.

I do not think the facts suggested in the affidavit and papers filed disclose any sufficient ground for interfering with the verdict. The plaintiff's action against Crabb may relate to other wheat; or, if it relates to this now in question it may have been brought to be persevered in only in the event of this suit failing:

Nor do I think that any improper evidence was received; for I do not consider that the objection to some of the affidavits annexed to the commission of interrogatories and answers fatal. There is certainly a partial variance in the plaintiff's name, but the references therein made to the commission, &c., annexed sufficiently connects them with this suit, and there is no doubt of the identity of the parties therewith. It has been held unnecessary to entitle an affidavit annexed to a plea in abatement,—*Prince v. Nicholson*, 5 Taunt. 333,—though if one of two plaintiffs' names be entirely omitted, the entitling will be insufficient—*Richards v. Setree*, 3 Price 197, which overrules the case in the Common Pleas.

I cannot say I think the verdict contrary to law or evidence. The application depends therefore upon the two remaining grounds of misdirection and excessive damages.

I find it stated by Tindal, C. J., in *Pontifex v. Wilkinson*, 1 C. B. 91, where it had been left to the jury to say which party was in fault in occasioning a contract not to be carried into effect, that he saw no misdirection therein, and that, if in commenting on the evidence, with the view to the explanation of the meaning of the question and of the ground of decision proper for the jury, the judge made observations which gave a different sense to the question than the defendant's counsel (who had stated it to be the proper question) had contended we think he should have made some suggestion to that effect at the time, for the consideration of the judge and not have brought such objections forward now for the first time; and that a rule for a new trial could not be supported on the grounds of misdirection, where the substantial question was left to the jury. That the question however, whether the plaintiffs wrongfully withdrew from the completion of the work on their part, or were discharged by the conduct of the defendant, was a fact depending on the construction the jury put, as well on the act of the parties as upon their correspondence, upon which question of fact the Court was not satisfied they had come to a proper conclusion, or that justice could be done between the parties without submitting the case to another trial, which was granted on payment of costs. In *Toulmin v. Hedley*, 2 C. & K. 157, where the question was, whether a cargo of guano was as warranted equal to average imports from Ichaboe, it was contended, upon a rule to set aside a verdict for the plaintiff for misdirection, that the jury were not told, as they should have been, that the cargo throughout should have been equal to the average imports, &c., and that the mode in which it was left was calculated to withdraw attention from that point though not specifically, but that in connection with the evidence it was likely to have such an effect.—In the Court of Exchequer, Pollock, C. B., said in terms, the direction is not open to exception in what precise sense he used the term (imported) did not appear, but the ques-

tion left to the jury was certainly one capable of being misunderstood, and for that reason the Court thought the case should go down again for trial, not for misdirection, or as being a verdict against evidence, but because the jury might have misunderstood the question put to them by the Judge correctly—costs to abide the event. In *Taylor v. Clay*, 9, Q. B. 718, it being urged that the learned judge had put the case too unfavourably to the plaintiff in point of law, on a question whether the master and crew had contributed to the accident by their own mismanagement, the Court thought the case had been well left to the jury, and that their decision on the fact was conclusive, and the judge was not dissatisfied with the conclusion the jury came to.—*Howden v. Standish*, 6 and C. B. 522 note A.; *Hall v. Payser*, 13 M. & W. 600. So here the learned judge is not dissatisfied with the conclusion the jury came to respecting the quality of the wheat, and I cannot say there was misdirection in the way he left the case to the jury. It was quite competent to him to make such observations touching the bearing of the evidence upon the points to be decided in discussing it with the jury.—*The Duke of Newcastle v. The Hundred of Broxtowe*, 4 B. & Ad. 273; 1 N. & M. 598. It does not appear that his observations induced them to come to a wrong conclusion. But he said nothing tantamount to taking the case out of their hands, or directing them to find one way rather than the other. It was left openly to them, and I cannot say I see sufficient grounds for a new trial on this ground. It was a case of conflicting testimony. Another jury could only express an opinion on the same evidence nothing newly discovered that could throw light upon the subject is alleged, and I apprehend it forms therefore one of those cases in which effect should be given to the verdict pronounced.—*Mellin v. Taylor*, 3 Bing. N. S. 109; 4 Chitty P., 2 of L.; 6 N. M. 38.

Lastly, as to excess of damages: The verdict in point of amount seems unwarranted by the evidence and the data by which the jury ought to have been guided in estimating the plaintiff's damages. It is, however a matter of mere computation, and the just sum seems to be 205*l.* 10*s.* 1*d.*

My learned brethren think that if the offer (must at all events remit the damages for some excess) undertakes to reduce them to the last mentioned amount, this rule may be discharged without costs; if not, to be made absolute on payment of costs.—*Leeson v. Smith*, 4 N. & M. 301; *Hughes v. Hughes*, 15 M. & W. 701; *Fletcher v. Marshall*, 15 M. & W. 764; *Moore v. Tuckwell*, 1 C. B. 607; seem to me to warrant this. I therefore concur with them in the course proposed.

SULLIVAN, J.—The plaintiff sues upon a special contract. The defendant is a miller, owning a flour mill on the Welland Canal. The plaintiff is a produce merchant. The plaintiff exhibited to the defendant a sample of wheat intended to be shipped from Goderich on Lake Huron to the defendant's mill, and the defendant contracted with the plaintiff by letter as follows: "I will manufacture the wheat, 5000 bushels, or any other shipment, and for every 4 bushels 40 lbs. of the quality shown me, I will deliver one barrel of flour to pass inspection in New York or Montreal as superfine flour."

The plaintiff alleges the shipping and delivery of wheat according to sample, and avers for breach that the defendant did not deliver to him flour of the quantity or quality, at the rate specified in the contract. The defendant pleads non-assumpsit, under which plea no question now arises; and secondly that the wheat shipped by the plaintiff to be ground was not according to the sample, but of an inferior quality.

The evidence at the trial was conflicting as to the quality of the wheat and it showed a delivery by the defendant of flour of a less quantity in proportion to the wheat delivered than the contract required, and of a quality which passed inspection in a grade inferior to superfine. The verdict was for the plaintiff.

A rule nisi was granted for a new trial, on the ground of alleged misdirection, and because the verdict was, as the defendant's counsel contended, contrary to the evidence, and for excessive damages.

The plaintiff, in showing cause against the rule, contended

by his counsel that he was not only entitled to have it left to the jury whether in fact the wheat delivered to be ground was or was not equal to the sample, but that the jury should have been charged that the contract was in effect one of bargain and sale, and the defendant not having refused to receive the wheat, and having ground it, was bound to deliver to the plaintiff the quantity and quality of flour mentioned in the contract, and that he should not be permitted to set up in evidence that the wheat thus accepted and ground was not equal to the sample; that the defendant's letters written after the reception of the wheat, do not repudiate the contract, or declare the wheat to be inferior to the sample, but only complained of the wheat being damp, and of the difficulty of making flour to pass as superfine out of the anticipated quantity of wheat, and that after the flour was made there was still no complaint of the inferiority of the wheat to the sample, but only of the dampness of the wheat, and the consequent difficulty of getting rid of the smut, which smut hurt the colour of the flour. The plaintiff's counsel also argued that the fact of the defendants having placed other wheat on the top of the plaintiff's wheat in the same chamber or reservoir which caused an admixture, showed a conclusive acceptance of the wheat under the contract, and that the delivery by the defendant of flour branded superfine showed conclusively his intention or conviction that up to that time he was bound by the contract, and was professing to act in its performance.

The defendant's counsel say that he had a right to a decided charge in his favour, because he proved that the flour delivered was made out of the wheat actually received, and that the best flour was made which the quality and condition of the wheat admitted, and that if the flour did not pass inspection as of the quality contracted for, this was because of the impossibility of making flour of that quality from such wheat, and that this should have been left to the jury as conclusive evidence that the wheat was not equal to the sample: that the defendants notice of the state of the wheat was sufficient to release him from the contract:

that his grinding the wheat was with the plaintiff's knowledge and assent: that the defendant was not concluded by the acceptance of the wheat; and that if the wheat was not in fact according to the sample, he was not bound to deliver flour of the quantity and quality contracted for: that he could not in law be held bound to do an impossibility in making flour of a certain quality out of wheat incapable of being made into flour of that quality.

I do not think that this was a contract of bargain and sale, for such a contract would have many consequences which are not to be derived from the one before us; for example, a change of property upon acceptance of the wheat, whether it was according to the sample or not, a liability of the wheat to be taken in execution for the debt of the defendant, and a change of risk if the wheat happened to be destroyed or injured by fire; and yet, from the peculiar wording of the defendant's letter which contains the contract, in which he undertakes to deliver one barrel of flour, to pass inspection as superfine, for every four bushels and forty pounds of the wheat equal to the sample, it is difficult to say that it would not be a good performance of the contract, to deliver flour of the quantity and quality contracted for, made from other wheat, and even if the wheat delivered had never been ground.

Though this is not a contract in the nature of a bargain and sale, many of the reasonable rules attendant upon the construction of contracts of sale, may I think be used in a case like the present, and it is not necessary for this purpose to trace out consequences or decide upon points which do not arise from the simple issue joined between the parties.—The plea is admitted to be good; it denies a material allegation in the declaration affecting the whole of the wheat: we must suppose it to be alleged on the one hand, that as an amalgamation of wheat it was not equal to the sample, and that on the other hand the plaintiff alleges that as a whole the wheat was equal to the sample, he undertakes to prove this before he can recover in the present action.—We have nothing to do with questions as to change of property or risk, and the delivery and acceptance of the wheat,

and the conduct of the parties can only be looked upon as so much evidence bearing upon the issue joined.

We find the important cases as to contracts of sale of goods which can bear upon the present question collected in the notes to *Cutler v. Powell*, 2 Sm. L. C. 15. The text cited from Starkies' N. P. seems the strongest authority for the doctrine contended for here by the plaintiff's counsel: "That where there is a specific bargain as to price and no warranty, the vendee must, when it is practicable to do so without prejudice, return the goods, and thus rescind the contract, and that if he does not, he must be taken to have acquiesced in the performance of the contract." Mr. Smith reviews the authorities cited in favor of Mr. Starkies' position, and shews them either to be overruled or not applicable to the extent of the doctrine laid down in the text. But he says, "that as a rule of evidence it may naturally enough be laid down, that if a question arise during an action for the price of goods, whether they did or did not correspond with the sample or other description in the contract, the fact that the vendee received and kept them without remonstrance, may fairly be urged to the jury as raising a presumption that they corresponded with the bargain." But it is one thing to contend for a presumption of this sort and another to establish a rule of law. A receipt in full raises a strong presumption of payment, but it is not conclusive. Why should the retainer of goods be more so?

The cases cited in Mr. Smith's notes regarding goods sold with a warranty, and the late case of *Dawson v. Collins*, 20 L. J. N. S. C. P. 116, 4 Eng. L. & E. Rep. 338, show that it has been made a question whether the vendee can return goods not corresponding with the warranty, or even whether he can refuse to accept a specific chattel not equal to the warranty. But there is no question or doubt upon this point—namely, that the vendee is not bound to return or to refuse to accept; he may have his action upon the warranty, or he may give the inferiority of the article in evidence in reduction of the price, under the general issue, and his acceptance and retention of the goods does

not conclude him to deny the facts of the goods equalling the warranty.

If then, in the case of a sale by sample or a sale upon a warranty, the receipt or detention of goods would not conclude the vendee, there is no reason why the defendant should by the acceptance and manufacture of the wheat be concluded from denying its equality to the sample. The receipt of the wheat without remonstrance, (if it were so), should weigh strongly against him. He cannot however be said to have received it altogether without remonstrance; he mentioned in his letter what was said by the working miller, but then in what he writes to the defendant he does not anywhere repudiate his obligation to be bound by the contract to deliver flour of a certain quantity and quality; this, if he intended not to abide by the contract, he should in prudence have done, and his not doing so was proper to be left to the jury. The plaintiff, on the other hand, did not reply to the defendant's letter that he insisted upon the contract, but he requests a sample of the wheat received to be kept, as he himself bought the wheat by sample, and this was for the purpose of having recourse against his vendors should the wheat shipped on his account prove in the end inferior to the sample. In fact, it is probable that the plaintiff never himself saw the wheat in quantity, and was not therefore in a condition either to admit or deny anything said as to the quality or condition of the wheat; his letter admits nothing, and if it denies nothing the want of such denial should not be taken against him.

I think that the nature of the transaction—namely, the shipping a cargo wheat from a port on Lake Huron, to be ground at mills on the Welland Canal, in its course of transmit to Montreal or New York—forbids the notion, that it was the intention of neither party that the wheat should be refused or returned by the miller in case it did not answer the sample. The correspondence leads to the same conclusion; but I see nothing in the transaction or in the correspondence between the parties to prevent either from asserting or denying any proposition regarding the quality of the wheat.

But, nevertheless, the want of a distinct declaration on the part of the party having the wheat in his possession that he would not hold it as equal to the sample, was proper to be left to the jury. His saying that the wheat was represented to him by his miller to be delivered in a damp state; his saying afterwards that the dampness prevented the disengagement of smut from the wheat, and affected the colour of the flour; were neither of them assertions that the wheat did not equal the sample; but such as they were they were left to the jury, and the whole, I think, tended to prove that the defendant did not consider that there was such a variance between the cargo and the sample as relieved him from the performance of his contract.

Again: the conduct of the defendant in placing a quantity of other wheat on the top of the plaintiff's wheat in the same chamber, so that when the wheat was drawn off, a considerable mixture took place, was proper to be left to the jury in two points of view, as bearing against the defendant. In the first place, it put it out of his power absolutely to say that the flour was ground from the plaintiff's wheat, and thus any argument to be raised from the quality of the flour to shew that the wheat was not equal to the sample, was considerably weakened, and he could not afterwards, with certainty compare any portion of the cargo received with the sample itself; indeed, it is not shown that any portion of the cargo was pretended to have been preserved for the purpose of such a comparison; and moreover it appears to me that the admixture shown was inconsistent with any other intention on the part of the defendant than that of being bound to perform the specific contract. If the defendant, because of the inferior quality or condition of the wheat received by him, was not bound to return flour of the quantity and quality contracted for, he was, as an alternative, at all events, liable to return such flour as the wheat actually received would make, allowing for his reasonable toll or profit. His mixing other wheat with that of the plaintiff showed no intention of this latter kind, for he never could afterwards say to the plaintiff, this is the actual produce of your own wheat: his conduct, on

the other hand, was quite consistent with an intention on his part to fulfil his specific undertaking. In acting thus, with that intention, he would be dealing simply with his own rights, and not making those of another questionable or uncertain. This was, in my opinion, a matter to be left to the consideration of the jury, as bearing against the defendant upon the issue to be tried.

In answer to this charge of admixture, it was urged by the defendant's counsel, that the quantity of wheat superimposed on the plaintiff's wheat was not sufficient to cause any considerable admixture, and that the wheat added was if anything, superior to the cargo.

This may have been so; but still the fact of the addition of even better wheat would show an intention to fulfil the contract, and the effect of all the evidence was with the jury.

In the third place, the defendant, in fulfilment of his express contract, or of an implied one, delivered flour, in barrels, branded "superfine;" this, in my opinion, tended to show, up to that time, an intention to fulfil the express contract; and if he had such intention then, it would be inconsistent with his present defence, that the wheat, when he received it, was not equal to the sample. Proof that the wheat did not make flour to pass inspection as superfine was no proof that the cargo was not equal to the sample, though it might be evidence of the defendant having undertaken what he could not perform, which would neither relieve him from his undertaking nor effect the issue to be tried. I do not think that the fact of delivery of the flour thus branded was by any means conclusive upon the defendant, but I am of opinion that the delivery of flour so branded was very proper to be left to the jury as more or less making against the defence set up.

I do not understand that my brother McLean did more than to leave these facts to the jury, and I cannot think his charge wrong, and I do not think the verdict against evidence, for upon the direct point in issue there was evidence on both sides, and there was very positive testimony given on the part of the plaintiff in support of his allegation that the wheat was equal to the sample.

Even if the defendant had, upon the reception of the wheat, (which reception I think was proper, whether the wheat was equal to or inferior to the sample,) written to the plaintiff to apprise him that the wheat was inferior, the alleged inferiority of the wheat would still be a question for the jury, upon the evidence. His not having distinctly and positively so written, made against him—to what extent I cannot say; that was for the consideration of the jury.

I think, therefore, that the defendant cannot prevail on the grounds of misdirection, or because the verdict was contrary to evidence; but, from the learned judge's notes it is manifest that there was a miscalculation of the amount of damages. No vindictive damages were claimed. The damages intended were merely founded on calculation, and can be ascertained now quite as well as before another jury. If the plaintiff be satisfied to reduce his verdict to the actual damages sustained, as we have calculated them, I think the rule should be discharged. If not, the rule should be made absolute on the ground of excessive damages, upon payment of costs.

MCLEAN, J., concurred.

KINNEY, ADMINISTRATRIX, v. MORLEY.

Action under 10 & 11 Vic. ch. 6, by an administratrix—Duty to repair walls—Evidence.

In an action on the case under the provincial statute 10 & 11 Vict. cap. 6, brought by an administratrix for negligently causing the death of the plaintiff's intestate, the declaration stated that at the times when, &c., the defendant was possessed of a close, and one T. A. was possessed of another close, adjoining the defendant's; that upon defendant's close a wall was standing, which before and at the time when, &c., was to the knowledge of the defendant in a dilapidated and dangerous state, and leaning towards the close of T. A. By reason whereof it became the duty of the defendant to take reasonable precautions to prevent the wall from falling; but that, well knowing the premises, he wrongfully permitted the wall to remain in that state, and that afterwards, by reason of such neglect, and while, &c., the said wall fell upon the close of T. A., and in falling killed the intestate, who was then lawfully in the said close of T. A. The defendant pleaded "not guilty." Upon the trial the jury found a verdict for the plaintiff, and the Court discharged a rule nisi for a new trial—holding that the declaration disclosed a legal liability in the defendant, and that the evidence (which is set out below) warranted the conclusion to which the jury had come. *Seem*, that, under this issue, the defendant was at liberty to show that the accident was caused, either wholly or in part, by the negligence of the intestate, or of others for whom the defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence; and that supposing the state of the wall as alleged in the declaration to be admitted in the pleadings, yet the defendant might, nevertheless, in evidence, show its actual condition, as bearing upon the question of negligence.

Declaration dated 16th September, 1851.

The plaintiff declares, for that before and at the time when

&c., defendant was possessed of a close, in the city of Kingston, and that Thomas Askew was possessed of another close, adjoining the defendant's said close, and that there was standing and being in and upon the said close of defendant a large wall—to wit, one hundred feet long, twenty-five feet high, and two feet thick—of defendant's, near to and almost adjoining the said close of Askew—to wit, ten inches from the west side thereof and running parallel with the said west side; which said wall was for a long time before, and at the said time when, &c., in a ruinous, dilapidated, unsafe, insecure, insufficient and dangerous state, and inclining and bearing in, upon and towards the said close of Askew, of which defendant had notice. (*Whereupon* it became and was defendant's *duty* to take reasonable precautions and care to prevent the said wall from falling over and giving way, or to remove and pull down the same.) Yet defendant, well knowing, &c., but disregarding, and carelessly, wrongfully, and negligently, and by his order, wrongful act, neglect, and default, suffered and permitted the said wall to remain, continue, and stand, and to be in and upon his said close in the said state, contrary to his duty, until (as afterwards mentioned) a large portion gave way and fell over: that the intestate, whilst the said wall was so standing in such state as aforesaid, by defendants wrong and neglect, as aforesaid—to wit, on, &c.—having lawful occasion, &c., entered on the said close of Askew, and was transacting his lawful business there, as he lawfully might; when, by the wrongful act, neglect, and default of defendant in suffering and permitting the said wall to stand and remain in and upon his said close, in the state and condition aforesaid, a large portion—to wit, fifty feet thereof—gave away and fell into and upon the said close of said Askew, at the place where said intestate was, &c., and that the said wall in falling struck him, whereby he was grievously injured, and within twelve months before suit died of such injury, &c., to plaintiff's damage, as administratrix, of 500*l.*, wherefore for self, as widow, and a son of deceased, she brings her suit, &c.

Plea, dated 25th September, 1851—that defendant is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in man

ner and form as the plaintiff hath above thereof complained against him : concluding to the country ; similiter and issue.

The case was tried before Macaulay, C. J., when a verdict was rendered for the plaintiff, with 75*l.* damages.

It was in evidence that the defendant and Mr. Askew possessed adjoining closes on Princess street in the city of Kingston ; that some years ago (how many not appearing) Askew had erected buildings on his close, including a wooden rough-cast kitchen at the extremity of his land, next adjoining the defendant's, but retired some distance from the public street : that such kitchen was built upon a stone foundation, running lengthways, parallel to and adjoining the defendant's close, and being about three feet from the top to the bottom (of which about eighteen or twenty-four inches was above the surface of the ground), and sixteen inches thick, that a chimney was also erected therein, the back of which rested on the wall next to the defendant's close ; that afterwards in the year 1847, the defendant erected a store or warehouse on his land, one end of which was a lime-stone gable, or wall, placed at the extremity of his close, adjoining and against the kitchen, &c., of Askew ; such wall being twenty or thirty feet long, twenty-five feet high from the bottom, two feet thick for the first ten or eleven feet, of the elevation, and eighteen or twenty inches for the residue ; it supported the ends of some of the joists placed in the building, and which may have tended to bind it and aid in its support or stability : that in April, 1851 ; a fire occurred accidentally—not shewn to have commenced on the defendant's premises—and with many others, consumed the buildings on both closes, including the kitchen on the one and the store-house on the other, but leaving the chimney of the kitchen and the gable-wall of the store both standing : that at first the defendant's wall was not considered materially injured or in danger of falling, and the defendant had contemplated and made some arrangements towards rebuilding and retaining this wall, but nothing had been done to it at the time of the accident : that, after the fire, Askew contracted with builders to erect new houses on his close, extending along the line of the old kitchen and adjoining the defendant's close : that

the contractors and work-men, in the month of June, removed the rubbish caused by the fire, and made the necessary excavations for the new building: that among other things, they took up the old kitchen foundation, and took down the chimney, and excavated for the new foundation to the rock, being several feet below the surface: that the plaintiff's husband was a foreman in these works; and that, while employed in digging for the new foundation, near the spot where the chimney had stood (and which had only been removed the day before, or partly the day before and partly on that day) a large portion of the defendant's wall suddenly gave away—breaking off several feet from the ground, on both sides where the chimney had stood—and falling over upon that part of Askew's close where the intestate was employed, killing him—his death so caused, forms the ground of the present action: that the defendant's wall inclined or leaned towards Askew's close; that it had obviously become insecure and unsafe, and that the defendant had notice or knowledge of its dangerous condition some time before, and especially on the day of and a few hours before its fall, when he was requested to remove it, or to consent to its being taken down, and had declined, relying upon the opinion of his architect, who, he said, had assured him that it was safe.

It was represented by the mason who built this wall (and who was called by the defendant) that it was erected on the solid rock—three feet ten inches below the surface, but not plum, having been built to the kitchen, &c., of Askew—the foundation wall of which, the defendant alleged (at the time the work was being done) encroached upon his limit, wherefore several inches in the thickness of the defendant's wall, next adjoining Askew's, were laid and rested upon such foundation wall, and which therefore must have been wider than the main sill of the kitchen: that the superstructure was raised against or made to conform to the kitchen and chimney, which not being perpendicular, but leaning out towards the defendant's close, caused the defendant's wall, in its original construction, to curve inwards, and, in some measure, to present a concave surface

next to Askew's close—but it was asserted that it did not rest against his kitchen or chimney, nor receive any support therefrom: that in consequence of the above, the defendant's wall, after the fire, had the appearance of leaning toward's Askew's close.

It was further in evidence that, in the course of their operations, Askew's men had taken up all the old kitchen foundation, including that part of it on which the defendant's wall had been partially rested, and witnesses called for the defendant attributed its fall to that cause. Witnesses on the plaintiff's behalf however denied that the excavations they had made weakened the wall, or facilitated or hastened its fall, alleging that it had been built loosely on the side next the kitchen, which caused it to settle or incline, after the fire, over upon Askew's close; and they denied undermining it, or that, in their opinion, it fell owing to the removal either of the chimney or foundation wall of the kitchen.

There was no proof that the defendant was aware of Askew's men having removed any portion of the substratum of his wall, if in fact they had done so.

Kirkpatrick, Q. C., for defendant, obtained a rule calling on the plaintiff to show cause why such verdict should not be set aside and a new trial had, without costs, as being contrary to law, evidence, and the judge's charge.

Gildersleeve showed cause, and contended that the plea of not guilty, denied only two facts: 1st, that the wall fell; and 2nd, that it killed the intestate; and yet it was left more broadly to the jury and in favour of the defendant; that the inducement was all admitted. *Taverner v. Little*, 5 Bing, N. S. 628, and *Frankum v. Earl Falmouth*, 2 A. & E. 452, show the effect of not guilty in case; that the wall was defendant's, on his close, dilapidated, and the intestate lawfully in Askew's close—*Hawkeshaw v. The District Council of Dalhousie*, 7 U. C. R. 590: that Askew could have maintained an action against defendant for a nuisance before the wall fell, by reason of its hanging over on his close. *Regina v. White*, 1 Bur. 337—what constitutes a nuisance; and that, even if the wall had been weakened by Askew, it

was immaterial.—*Peyton v. The Mayor of London*, 9 B. & C. 725; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; 2 Roll. Ab. 564.

Kirkpatrick, in reply, referred to *Holding v. The Liverpool Gas Co.*, 15 L.J. (1846), as to the pleadings, and also to 10 Ju. 883 S.C.; and contended that if the act of the deceased or Askew contributed towards the fall, it was a good defence and provable under the general issue.—*Bridge v. the Grand Junction R. W. Co.*, 3 M. & W. 244; and he relied upon the proof that Askew had undermined the wall, as showing that all the fault was not on defendant's part: that had Askew entered defendant's close and thrown down the wall, the defendant might have prosecuted him therefor in trespass, and that shows the present action not tenable.—2 Roll Ab. 565, Com. Dig., action on the case for nuisance (A); *Shigsby v. Barnard*, 1 Roll R. 430; *Roberts v. Read*, 16 East, 215; *Jones v. Bird*, 513 B. & A. 837; *Sutton v. Clarke*, 6 Taunt, 29, 3 Wil. 461, 2 W. B. 924 S. C.; *Hide v. Thornborough*, 2 C. & K. 250; *Hutton v. London R. W. Co.*, 18 L. J. C. P. 344; 19 L. J. Ex. 170, 273, 291; *Chauntler v. Robinson*, 4 Ex. R., 163; *Deane v. Clayton*, 7 Taunt, 489; *Dodd v. Holme*, 1 A. & E., 493. In point as to negligence being found by the jury; 1 C. & J. 20; *Embrey v. Owen*, 15 Ju. 633; 20 L. J. Ex., 212; *Payne v. Rogers*; *Dawson v. Moore*, 7 C. & P. 25; *Mumery v. Paul*, 2 D. & L. 585; *Norris v. Daniell*, 4 Man & Scott, 383; *Proctor v. Harris*, 4 C. & P. 337.

MACAULAY, C. J.—This is an action on the case founded upon the provincial statute 10 & 11 Vic. ch. 6, which enacts that whensoever the death of a person shall be caused by wrongful act, neglect, or default, such as would (had death not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the persons who would have been liable, shall be liable to an action, at the suit of the administrator or executor of the person deceased; wherefore the test is whether the intestate could have sustained an action had he only sustained a bodily injury, not mortal.—*Armsworth v. South-Eastern R. W. Co.*, 11 Ju. 758; *Tucker v. Chaplin*, 2 C. & K. 730.

It is proper to distinguish between actions on the case, and of trespass *vi et armis*, also between cases of tort founded on malfeasance or misfeasance, where a wrongful act is alleged, and those founded on nonfeasance where a breach of duty is averred; so, likewise, between cases in which the owners of houses, walls, &c., are plaintiffs, complaining of injury thereto by misfeasance or nonfeasance, amounting to actionable neglect on the part of others, and those in which the owners are defendant's, charged with culpable negligence, in relation to the houses, walls, &c., in their possession. The present is an action of the last mentioned kind.

The plaintiff, by way of inducement, states the facts relied upon as creating the defendant's duty, and then alleges a breach of that duty and the consequential injury. The facts stated, as creating the duty, are the defendant's possession of the close adjoining the close of Askew, on which was standing a wall (of what materials not alleged), near to and next adjoining Askew's close, which wall was ruinous, dilapidated, &c., and inclining and leaning in and towards the last mentioned close, of which the defendant had notice, whereupon it became and was his duty to prevent its falling over, (not saying on Askew's close), or giving way, or to remove or pull it down. The breach of such duty is stated to be that the defendant, wrongfully and negligently, suffered and permitted the said wall to remain, continue, and stand in and upon his said close in that state, until a large portion gave way, and fell down into and upon the said close of Askew, and struck and killed the intestate, who was at the time lawfully in the last mentioned close. The only plea pleaded is, not guilty, denying such breach of duty or negligence; that is, it denies that the defendant wrongfully, and negligently, &c., suffered and permitted the said wall to remain, continue, and stand, in and upon his close, in the state alleged, until and when a large portion fell.

The case of *Brown v. Mallett*, 4 C. B. 600, shows that the allegation of duty will not aid the declaration, or supply the want of facts from which such duty can be inferred in

law—being looked upon as a mere averment of matter of law or legal liability as following upon the facts stated, so that it is useless, when the declaration is insufficient, and superfluous when it is sufficient without it.—*Seymour v. Maddox*, 16 Law Times, Q. B.; and see *Towler v. Chadwick*, 3 Bing. N. S. 334; *Priestley v. Fowler*, 3 M. & W. 1; and *Parnaby v. The Lancaster Canal Co.*, 11 A. & E. 223. In like manner, the allegation that the defendant's conduct was wrongful, does not enhance the force of the charge that it was negligent; *Regina v. Leeds and Liverpool Canal Co.*, 6 A. & E. 687; 16 East. 215; *Frankum v. Earl of Falmouth*, 2 A. & E. 452; *Powell v. Bradbury*, 7 C. B. 201. Nor is it clear that notice is material, if the defendant was bound to prevent the wall from falling. But the declaration is taken to ascribe the whole injury to the defendant's negligence—per Lord Abinger in *Gough v. Bryan*, 2 M. & W. 773. The sufficiency of the declaration, and the defendant's responsibility as being possessed of the close in which the wall stood at the extremity of such close, for damage or injury arising therefrom to the adjoining close, or to persons lawfully therein, if attributable to positive neglect on his part, though not constituting also a public nuisance, has not been denied; and I find no reason to doubt his liability if a case of negligence, as laid, was legally established against him; *Rose v. Groves*, 5 M. & G. 613; *Vaughan v. Menlove*, 3 B. N. S. 468; 7 C. & P. 525, S. C.; *Witte v. Hague*, 2 D. & R. 33; *Sybray v. White*, 1 M. & W. 435; *Aldridge v. The Great Western R. W. Co.*, 3 M. & G. 515; *Barns v. Ward*, 2 C. & K. 661; *Sly v. Edgely*, 6 Esp. 6; *Broom's Legal Maxims*, 160, where many of the cases are collected; 1 *Smith's Leading Cases*, 130; and sec. 20 *Vin. Ab.* 514; *Booth v. Wilson*, 1 B. & Al. 59; *Regina v. Wattson*, 2 Ld. Raymond 856; *Tenant v. Goldwin*, 6 Mod. 311; 1 Sal. 21 S. C.; *Ib.* 360, S. C.; *Holt*, 500, S. C.; 2 Ld. Raymond, 1089, S. C.; 11 Mod. 7 Anon.; *Vin. Ab. Actions Case N. C.* 149; 1 Sid. 167; *Peyton v. Lord Mayor of London*, 9 B. & C. 725; *Pomfret v. Ricroft* 1 Saund. 322; *Wyatt v. Harrison*, 3 B. & Ado. 871; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 224;

Hide v. Thornborough, 2 C. & K. 250; Dodd v. Holme, 1 A. & E. 493; Chadwick v. Trower, 3 Bing. N. S. 334; Bush v. Steinman, 1 B. & P. 404; Massay v. Goyner, 4 C. & P. 161.

Then it is to be considered, what the plea of not guilty puts in issue, and what is open to the defendant to prove under it.

The new rules (Cameron's Rules, p. 57, No. 4), provide that in actions on the case the plea of not guilty shall operate as a denial of the *breach of duty* or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and that no other defence than such denial shall be admissible under that plea, &c.; also, that the plea of not guilty in trespass only denies that the defendant committed the trespass alleged, or the act complained of, which is always one of commission, without regard to its wrongfulness, which may consist of omission. The illustrations given under the rule, in pleas of not guilty in case, are principally of wrongful acts; those relative to breach of duty are supposed actions of escape, or against carriers for loss of goods; the one operating only as a denial of the neglect or default of the officer, but not of the debt, judgment, or preliminary proceedings; and the other as a denial of the loss or damage, but not of the receipt of the goods to be carried, &c. In these instances, the line between what is matter of inducement and the wrongful act or breach of duty, is distinct and clear; but it is not always so. The case of Wright v. Lainson, 2 M. & W. 739, explained what was inducement as distinguished from the breach of duty, and what not guilty put in issue in an action against a sheriff for false return of "nulla bona" to a fi. fa.; see also Lewis v. Alcock, 3 M. & W. 188; as to which Ashby v. Minnett, 8 A. & E. 121; Wintle v. Freeman, 11 A. & E. 159; Davies v. Mann, 10 M. & W. 546; Pickwood v. Neate, 10 M. & W. 211, 546; Tracey v. Nelson, 12 M. & W. 534.

I think that a plea imputing concurrent negligence to the plaintiff is bad, as amounting to not guilty (that is in case), and that such matter may be given in evidence under the

latter plea; *Gough v. Bryan*, 2 M. & W. 773; *Bridge v. The Grand Junction R. W. Co.*, 3 M. & W. 244; *Marriott v. Stanley*, 1 M. & G. 568, 576, and note; *Pritchard v. Long*, 9 M. & W. 665; *Holding v. Liverpool Gas Co.*, 10 Jur. 883; *Frankum v. Lord Falmouth*, 2 A. & E. 452; *Taverney v. Little*, 5 Bing. N. S. 678; *Powell v. Bradbury*, 7 C. B. 201; *Tucker v. Claplin*, 2 C. & K. 730; *Sills v. Brown*, 9 C. & P. 601; *Clayards v. Dettrick*, 2 Q. B. 439; *Holding v. The Liverpool Gas Co.*, 3 C. B. 1; 19 L. J. Ex.; 1 Taylor's Ev. pp. 220 and 226; S. 223 and S. 229.

To apply the authorities to the present case, I think they show that the plea pleaded, denied the breach of duty alleged—namely, the defendant's negligence in the premises—and that, in relation to the injury sustained by the intestate, the defendant might prove under it that he, or others for whom he was not responsible, were also to blame, and were more or less instrumental in negligently or carelessly contributing towards the event. I think it also put in issue the reasonableness of time after the wall became dangerous for the defendant to have secured it before it fell, and of course its falling and killing the plaintiff's husband. In the case *Browe v. Mallet*, above cited, want of reasonable time (though not averred in the declaration) was pleaded with a verification, and the plea was demurred to, but the declaration being held bad, no judgment was given on the plea.

Admitting that the state of the wall, as alleged in the declaration, is not denied or put in issue by the plea, it does not follow that, in order to repel the charge of negligence, the defendant could not prove how and by whose acts or means it became in that state and was caused to fall; but it appears to me the actual state of the wall was material in relation to the question of negligence, and therefore in issue; the general allegation in the declaration does not show its actual condition; its real state, inclination, bearing, apparent weakness, hazardous condition, and probability of falling, to the defendant's knowledge, constituted the evidence or proof of negligence on his part; for, if apparently upright, sound, and secure, or if there was little or no reason to apprehend its fall, the charge of negligence

would be repelled. The alleged negligence was to be tested by determining whether the wall was in fact in such a dangerous state that the defendant was inexcusable and heedless in permitting it to continue in such state, at the risk of its falling over upon Askew's close, and doing damage there; or whether it was to common observation, or so far as he was proved to have known, apparently firm and stable, so that a man of judgment and prudence might be exonerated from blame in suffering it to remain, in the confidence that there was no imminent danger of its falling. The defendant's negligence was to be established by showing the positive state of the wall, and his knowledge thereof, in due time to have prevented its falling, where and as it did; in reference to which, the excavations made in Askew's close, the extent and effect thereof on the defendant's walls and defendant's knowledge or notice thereof, were facts material and relevant; *Dodd v. Holme*, 1 A. & E. 493; *Daniells v. Potter*, 4 C. & P. 262; *Vaughan v. Menlove*, 3 Bing. N. S. 468; *Aldridge v. The Great Western Railway Co.*, 1 M. & G. 555.

In the present case, the declaration does not allege that the wall was in danger of falling; and it appears to me the charge of negligence depended upon the danger to which its fall was threatened (depending of course upon its actual condition), together with the opportunity to the defendant to have secured it, after it became in a state so hazardous, and that such facts were involved in and open to enquiry and proof under the plea of not guilty.

Under the circumstances in evidence, Askew might have been a plaintiff, complaining of the defendant for suffering the wall to fall in his close (*a*), or the defendant might have been a plaintiff, complaining of Askew for undermining the wall, whereby it fell. The analogy between an action brought by Askew, especially had he been personally injured, and the present, is obvious; in such a case, as in the present, it would have been for an alleged breach of duty, or

(*a*) *Cro. Jas.* 204; 1 *Ld. Raymond*, 187; 2 *Vin. Ab.* 13 Pl. 36; 8 *T. R.* 72; 1 *Star. N. P. C.* 22 & 173; 8 *Bing.* 186; 1 *A. & E.* 822; 10 *A. & E.* 503; 2 *A. & E.* 534; 2 *M. & W.* 424; 3 *M. & W.* 483; 5 *M. & W.* 437; 7 *M. W.* 456.

legal obligation, on the defendant's part; had the defendant been a plaintiff, as suggested, the event of this trial shows that he would have failed in his action. It was not at the trial pretended that the defendant threw down the wall, or by any wilful act of his caused it to be delapidated or hastened its fall; but the state of the wall was proved, whether in issue or not; and the defendant's knowledge thereof, and the duty alleged, and the defendant's neglect thereof, were inferred from such facts, however the dilapidated state of the wall might have been occasioned. The breach of duty being, not that the defendant did not take down the wall or strengthen it, but that he knowingly permitted it to stand in the condition proved, until it fell and killed the intestate.

It was not relied upon as a defence that the fall was attributable to any immediate or contemporaneous act or agency of the deceased, or that he was himself negligent or to blame, or wanting in due and reasonable precaution, to avoid the danger at the moment of the fall; if it had, I think the authorities fully establish that his conduct at that crisis, might have been proved under the general issue, as showing that the whole injury was not attributable to the defendant; but the defence was rested upon the ground that the intestate and others, in Askew's employment, by previous acts of theirs in Askew's close, especially in excavating under a portion of the defendant's wall, had weakened it, and had thereby materially and immediately contributed towards its fall at the time it fell, whereupon the defendant was not responsible for the consequences, and I am disposed to think the intestate's agency in previously withdrawing the support of the wall, if he did so, was admissible, as showing that the accident occurred, not from the negligent nonfeasance of the defendant but the active misfeasance of the intestate and others—*Vanderplank v. Miller*, 1 M. & M. 169; *Massey v. Goyner*, 4 C. & P. 161; *Randleson v. Murray*, 8 A. & E. 109; *Allen v. Hayward*, 720 B. 975; *Tucker v. Chaplin*, 2 C. & K. 730.

The plaintiff's counsel contended that the only plea pleaded, did not put in issue the state or hazardous condition

of the wall, nor the cause thereof, nor of its fall (all of which not being traversed in terms, were admitted), but that the only facts in issue, were the defendant's knowledge of its weak and insecure state, with a reasonable time to have repaired or removed it, and that by whomsoever and howsoever rendered unsafe, it would be his wilful neglect and default if, after due notice and a reasonable time, he failed to adopt the necessary steps to prevent its falling over on Askew's close. On the other hand, the defendant's counsel urged that in exoneration of himself from the imputed neglect, he might show that the intestate had assisted in weakening the wall and hastening its fall; and that he was not bound to guard against the consequences of such conduct; in short, that it repelled the negligence alleged. The case presented itself, therefore, in two aspects; one upon the assumption that Askew's workmen had done nothing in his close to hasten the fall of the wall; the other, that they had, and further, that in so doing, they had not confined themselves strictly within the limits of Askew's close, but had encroached upon the defendant's. In leaving it to the jury, I said that if they thought the defective state of the wall and its fall were attributable to acts of the deceased and others, and not to the acts or omissions of the defendant, he was not liable, nor if the fall at the time it fell was partly attributable to both—that is, it both were in fault. The verdict under my charge must be taken to import that in the opinion of the jury, all the fault was on the defendant's part. Whether a reasonable time had elapsed after notice to the defendant was not expressly made a point with the jury, but, so far as material, it was involved in the more general question submitted to them—namely, whether the accident was to be ascribed to the defendant's omission or default exclusively—which was treated as the gist of the cause. It was made a question whether the neglect or default was all on the defendant's part, or whether the cause of the injury was, in any material degree, attributable to the act or neglect of the intestate or others, for whose conduct the defendant was not responsible—this point depending upon the fact whether Askew's men had injured the wall,

in which event it would have been incumbent upon them to have shored it and prevented its fall, and not upon the defendant—Com. Dig. actions on the case, B. 4; 2 H. B. 527; Sills v. Brown, 7 C. & P. 601; Coldridge, J., told the jury the question was, whether the plaintiff, by his negligence, *substantially* contributed to the *occurrence*, and not merely to the amount of the injury. And see Raisin v. Mitchell, 9 C. & P. 613; Pontifex v. Wilkenson, 1 C. B. 75.

Neither was the question of disputed boundary gone into at the trial, but the case was disposed of on the broad ground whether Askew's men had, in fact, excavated under any portion of defendant's wall, and if so, whether that contributed to occasion its fall. The fact might have been material in the plaintiff's behalf, if the kitchen wall of Askew and the excavations made, did not extend beyond his boundary line; so it might have been material to the defendant, if the foundation wall of Askew's kitchen did extend into and upon the defendant's close, so as to entitle him to rest his wall partly upon it. It was left to the jury in the way most favourable to the defendant, that upon the broad fact, whether the deceased or others had undermined the defendant's wall or not, without regard to boundary, or whether the excavation extended beyond Askew's limit or not, if in truth the wall was undermined, or its fall facilitated and hastened by their operations. If the defendant's wall encroached upon Askew's close, and rested upon a foundation of his within his own limits, the cases establish that the defendant could not maintain an action against Askew for causing his wall to fall, unless he had acquired a right to the support, if any, derived from Askew's close by twenty years' enjoyment, of which there was no proof, or unless the workmen had trespassed upon the defendant's close in making the excavation, or had conducted themselves carelessly or negligently; in any such event, Askew would be responsible. There was no proof that he had acquired any right to exceed his limits by twenty years' enjoyment or adverse possession, without which the defendant might legally have rested his wall on the foundation of Askew's kitchen, so long as he did not exceed the limits of his own close, and

Askew would not be justified in afterwards withdrawing the support—*Massey v. Goyner*, 4 C. & P. 169; *Harris v. Ryding*, 5 M. & W. 60; *Wilson v. Peter*, 6 Moor. 47; *Coventry v. Stone*, 2 Star. N. P. C. 534; and *Ib. Hill v. Warren*, 377; *Bradbee v. Mayor of London*, 4 M. & G. 714; but that, under the circumstances in evidence and the finding of the jury, Askew had not infringed upon the defendant or incurred any legal liability to him, numerous cases, both ancient and modern show.—*Slingsby v. Barnard*, 1 Roll. R. 430; 2 Roll. Ab. 565; 20 Vin. Ab. 514; *Trespass*, I. A. (1). If A. build a house on the confines of B.'s land, B. is not liable for afterwards excavating, whereby A.'s house fell.—*Com. Dig. Action on the case for nuisance A. Smith v. Martin*, 2 Saund. 400; and note, where the cases are thus summed up and referred to—"According to the modern authorities, though if my land adjoin that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action (2 Roll Ab. *Trespass*, I Pl. 1), yet if I have laid an additional weight on my land by building, my neighbour is not to be deprived of his right of digging his own ground, because mine will then become incapable of supporting the artificial weight I have laid upon it—*Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Peyton v. Mayor of London*, 9 B. & C. 725; *Massey v. Goyner*, 4 C. & P. 161; unless from the lapse of time, my building was erected or otherwise a grant from my neighbour of a right to support for it from his ground can be inferred, or such right has been gained under Lord Tenterden's act—*Partridge v. Scott*, 3 M. & W. 220; *Brown v. Widson*, 1 C. & J. 20; or, according to some authorities, unless he withdraws the support negligently—*Walters v. Pheil*, 1 M. & M. 363; *Dodd v. Holme*, 1 A. & E. 493; 3 N. & M. 739; *Trower v. Chadwick*, 3 Bing. N. S. 334; *Davis v. London R. W. Co.*, 1 M. & G. 799; *Harris v. Ryding*, 5 M. & W. 60. Nor is he bound to give me notice that he intends to withdraw it—*Chadwick v. Trower*, 6 B. N. S. 1; S. C. 8 Scott 1. To which may be added—*Wyatt v. Harrison*, 3 B. & Adol.

871. I look upon it therefore as a matter indifferent or uncertain whether the defendant's wall was rested partly upon Askew's or not, or whether, if so, it extended beyond the defendant's true limit or not, but I infer from the verdict that the jury was satisfied that, at all events, nothing done by Askew's men contributed towards the fall of the defendant's wall, and that there was negligence, all of which they imputed to the defendant. If then my charge to the jury is not objectionable, as being too unfavourable to the defendant, it follows that he is liable, unless the facts as laid in the declaration and proved at the trial do not establish the duty or legal liability charged upon the defendant; or, if they do, unless the evidence in exoneration preponderated in his favour to a degree entitling him to a new trial. I think there was evidence of facts, from which the jury might find (and upon their finding I infer that they were satisfied of such facts) that the defendant was negligent in the manner and form alleged against him; and I cannot say I consider the verdict was contrary to, or against the weight of evidence. It was for the jury, who may have thought it quite as reasonable that the defendant ought to have taken down or secured the wall, as that Askew should have adopted the precautions necessary to have prevented its falling, or refrained from his building operations altogether, and that in the state it was to the defendant's knowledge, it was incumbent upon him to have prevented its falling upon Askew's close, and thereby killing his workmen, engaged as he was, rather than that the labourers worked when, where, and as they did, at their own peril, in the event of accident. The jury virtually acquitted the intestate of any culpability or neglect on his part. Upon the whole I come to the conclusion that, notwithstanding the wall became weakened by an accidental fire and not through natural decay, nor from any cause under the defendant's control or importing neglect on his part, still, that having through accident been reduced to the state it was, the onus was upon him (the wall being his, upon his close, and in his possession) to have prevented its falling upon or doing injury to the adjacent close, or any one lawfully

therein, as a legal consequence resulting from his having placed it so near the extremity of his own land: that it was manifestly in a dangerous condition, of which he had full notice, with ample time to have secured or removed it, after which he persisted in suffering it to stand, and therefore did so at his own risk as to consequences: that it was not established to the satisfaction of the jury that its fall was facilitated by the excavation made in Askew's close by his workmen—a point distinctly left to them: that so long as Askew's men did nothing but what they were legally entitled to do, the defendant was bound to guard against the consequences, so far as respected the maintenance of his own wall upon his own close: that there was evidence of negligence, considering the dilapidated state of the wall, its obvious and dangerous appearance, and the warning the defendant had received: that we must now assume that the jury were satisfied of the defendant's neglect in the premises, and that, in their opinion, the whole injury or occurrence, so far as attributable to negligence, was wholly chargeable against the defendant's neglect, without the deceased or others (for whose acts the defendant was not responsible) having substantially contributed to the occurrence, or injury sustained: that the verdict was warranted in law and evidence, and that therefore the rule should be discharged.

SULLIVAN, J.—This was an action upon the case, under the provincial statute 10 & 11 Vic., ch. 6, brought by the widow and administratrix of Kinney, deceased, against the defendant, for negligently allowing a wall of his house to remain in a dilapidated and insecure state, so that it fell and killed the plaintiff's husband. The plea was "not guilty."

The evidence at the trial, before the Chief Justice of this court, shewed that the house of a neighbour named Askew was built before the house of the defendant, and that when the defendant, or the person who built the house which the defendant owned at the time of the accident, built the wall from the falling of which the casualty complained of resulted, Askew's house had been already built at or near the extreme boundary of Askew's ground; Askew's wall

had not been raised perpendiculary from the foundation, neither was the wall of the defendant, which latter wall, which was the later built of the two, was stated by the witnesses to have inclined outwards towards Askew's premises. The precise boundary of the respective ground of Askew and the defendant was not shewn in evidence, neither is there any legal presumption arising in this case, as between the plaintiff and defendant, to determine where the boundary was. It further appears, that Askew's house was destroyed by fire; it does not appear that the defendant's wall ever leaned against Askew's wall, but after the fire it is shewn that the defendant's wall was in a dilapidated condition. The deceased was a workman employed by Askew, after the fire, in the preparation of his ground for a new building, and, while employed to this end, the wall of the defendant fell upon and killed him. The evidence may be said to be contradictory upon the material point—namely, whether the wall fell in consequence of its own state of dilapidation, and of its own inclination outwards; or, whether its fall was accelerated or caused by the work of the deceased and other servants of Askew in preparing for the new erection. This question was left to the jury by the learned Chief Justice of this court, with a direction, that if the proximate cause of the falling of the wall and of the consequent death of the deceased was the unskilful or negligent work of Askew and his servants, or if their unskilful or negligent work had any share in causing the accident, the verdict should be for the defendant. The jury found for the plaintiff.

The plaintiff's counsel insists now, on shewing cause, that the defendant should have shored his wall; that it was in a dilapidated condition after the fire; that the defendant had the legal obligation upon him of preventing the fall of the wall, to the injury of any one exercising his lawful business upon the adjoining ground; and that, under the plea of not guilty, the defendant had no right to say that the injury was caused on the whole, or in part by the owner of the adjoining land, or by his servants, or by the person who was killed by the fall of the wall; and that therefore, so far from the defendant having any cause of complaint

against the charge of the learned Chief Justice, that the case was left to the jury with a charge too favourable to the defendant ; and that therefore *a fortiori*, the plaintiff had a right to maintain a verdict, which, if it had been for the defendant, would have been contrary to law and the consequence of misdirection.

On the part of the defendant it was insisted, that the owner of the adjoining ground, when he was preparing his own land for a new erection, had the duty cast upon him of maintaining his neighbour's wall until the new erection should support it ; that, in the absence of other proof, the outward inclination of the defendant's wall from the foundation, and the further fact that the foundation had a support from the foundation of Askew's house, showed that the defendant had property in the foundation of Askew's house, to a point therein perpendicular to the outward extreme of the leaning of the defendant's wall ; that the removal of that foundation was therefore a wrong, and the support one to which the defendant was entitled, and if accident happened by the removal of that support, the persons who removed it were accountable and not the defendant, and *a fortiori* the defendant could not be charged with the consequences of the accident if the deceased himself was, at the time of the wall's falling, employed in the removal of the support to which the owner of the wall was legally entitled. The defendant's counsel further argued, that the fact of the wall falling on the removal of the support given by Askew's foundation, demonstrably proved that the deceased was the victim of his own wrongful act, and not of any neglect on the part of the defendant, who had a right upon his own premises to have a dilapidated wall, and who had a right, at all events, that the wall upon his premises should not be disturbed by work done on the neighbouring soil ; and that the owner of the adjoining land, when he caused work to be done about the wall, was bound to take proper precaution, by supporting the impending wall, in the first place, to avoid liability to the owner of the wall, and, secondly, to protect himself and his servants from the effects of its fall ; that he, and not the present defendant, should therefore have been accountable for the accident. It was further

argued on the part of the defendant that the evidence incontestibly shewed that the falling of the wall was occasioned by the work of the deceased and other servants of Askew; and that it should not have been left to the jury, as a fact to be tried, whether that work had been negligently, or unskilfully, or improperly performed.

This case involves very important rules of law, and it has been well argued. The authorities cited, lead to all the learning to be found on the subject; I shall notice those upon which, after a laborious examination, I have founded my opinion.

Cases are not to be found directly in point—that is to say, no case that I have met with is an action for the injury sustained by the falling of a wall, built on the premises of the defendant, and which he was bound to keep in a safe condition, so as to avoid injury from its failure to others. But I think the cases which we find of indictments for nuisance are apposite to the case before us. Thus *Rigney v. White*, 2 Burr 277, for erecting near the common highway a manufactory of sulphuric acid—*Rex v. Moore*, 3 B. & Ad. 284, for keeping a place to shoot at pigeons near the common highway—*Regina v. Watts*, 1 Salk. 357, a house in a state of decay and in danger of falling down, is a nuisance for which the owner is indictable; *Tubnill v. Stamp*, 1 Salk. 13.

It seems to me to follow that in any case in which a party is indictable for a common nuisance, any person suffering particularly from the nuisance may have his action on the case. This was decided in the case of *Watson v. The Gas Company*, 4 U. C. Q. B. R. 158, where the plaintiff alleged that the defendants corrupted and injured the water of the Bay of Toronto, whereby his distillery adjoining the defendant's premises was injured. A reference to that case, and the authorities therein cited, will show that even where the right is common to all the subjects of the crown, an action will lie at the suit of any one who has sustained an injury peculiar to himself.

I do not see any room to doubt that in a case like that of *Regina v. Watts*, if the house had fallen and injured in its fall any individual, but that the person so injured would have had an action on the case against the owner of the house;

and although in the case of a wall erected on the boundary of a man's land, the public may have no interest, yet the owner of the contiguous ground, has a private interest which would enable him to sue in an action on the case for a private nuisance, even if there were but danger, which worked him an injury ; and *a fortiori* he and all persons in the pursuit of their lawful business on the adjoining premises who received an actual injury, by the falling of a house or wall, which it was the duty of the defendant to maintain, would have an action for the private injury.

I think we must, as between the present parties, take the wall to be lawfully erected, and in a rightful shape and position, and that it cannot be presumed that any portion of it protruded beyond or retreated within defendant's land. Then the obligation to maintain the wall, or take it away so as not to be dangerous, was upon the defendant ; he had no right to any support to his wall from the adjoining wall while it remained standing ; he had no right that Askew should shore it when his own house was destroyed by fire ; he had no obligation to shore or support it before he prepared for the erection of a new building on his own land.

In *Priestley v. Fowler*, 3 M. & W. 1, it was decided on motion in arrest of judgment, that a master ordering his servant to proceed in a certain van, was not responsible for defects in the carriage whereby the servant was hurt, he not being alleged *to have known* of the defects.—*Barnes v. Ward*, 2 C. & K. 660. The owner of ground abutting a road, was held liable to the family of a man killed by falling into the area of defendant's house, the defendant not having fenced off the area.—*Bush v. Steinman*, 404 ; *Sly v. Edgecombe*, 6 Esp. 6 ; *Chadwick v. Trower*, 3 Bing. N. C. 334. A man may dig in his own land, and is not liable, though the digging cause the fall of his neighbour's house, and he need not give notice of his intention to dig. This case has some analogy to the present one, and would be like it if the house in falling had killed the person digging, and the owner of the house had been sued by his family. The notice would then have been of importance. In the case before us, the defendant must have

known that the wall was in a dilapidated and dangerous state.—*Leslie v. Pounds*, 4 Taunt. 640; *Payne v. Rogers*, 1 H. B. 351. The owner of a house was held liable for not repairing the foot pavement, whereby the plaintiff injured his leg by its slipping through into a vault or cellar. In *Hawkinshaw v. The District Council of Dalhousie*, 7 U. C. R. 590, it was held that the District Council were not liable for an injury through defect in the court house steps, the principal ground of the judgment being that the council could not have directed repair without report of the district surveyor. The learned Chief Justice in that case, expressed an opinion that a person was not liable for accident through want of repair within his own premises, unless in the case of an adjoining highway when the injury is to a passage; and I think the same rule, or rather the exception, will apply when the injury is to persons lawfully on adjoining ground.—*Russell v. The Men of Devon*, 2 T. R. 672; *Peyton v. The Lord Mayor of London*, 9 B. & C. 725, is clear authority to show that an owner of a house has no right to have his house shored, by his neighbour who pulled down his own house adjoining, and by reason of the removal of which the plaintiff's house fell. The Court held that the owner was bound to protect himself by shoring, and I cannot doubt but that an action would have lain against him, if after notice that his wall was in a dangerous state, and after neglect of his to repair it, it had fallen, and caused injury in the neighbouring ground. See also *Partridge v. Scott*, 3 M. & W. 220; *Dodd v. Holme*, 1 Ad. & El. 463. It is true that the owner of a wall has no right to enter his neighbour's premises to shore up his own wall.—*Wilder v. Misterly*, 2 Rolls. Ab. 564; *Wyatt v. Harrison*, 3 B. & Ad. 871. But then if he wishes to save the wall for his own sake, he should shore from within, or if he wishes to avoid injury to others, he may take the wall down; but it is plain that he neither can demand reparation for injury to the wall by lawful and skilful excavation in the neighbouring land, nor successfully resist an action for damage done to persons on the adjoining land by the fall of the wall, which he has suffered to be and remain in a dilapidated

and dangerous state.—*Jones v. Bird*, 5 B. & Al. 837, has been cited to show a contrary doctrine. But that was a case against the commissioners of sewers, for undermining a stack of chimneys in the construction of a drain, and the Court held that the defendants were bound to take all necessary precautions, and to shore up the buildings above their work if necessary.—*Tubnill v. Stamp*, 1 Salk. 13, was a case of negligently keeping a fire in a field, whereby it spread; the defendant was held liable, but would not have been so had a sudden storm arose which he could not stop, and which would be a matter of evidence.—*Acton v. Blundell*, 12 M. & W. 353, is decisive upon a question relating to water, a river of the defendant's happened to drain and exhaust a well of the plaintiff's.—*Tindall, C. J.*, recognized the authority of *Partridge v. Scott*, to show that a man building on the extremity of his own ground, has no right to any easement for support or otherwise over the adjoining land of his neighbour. He has no right to load his own soil so as to require the support of that of his neighbour's. But it must follow (says *Tindall, C. J.*) by a parity of reasoning, that if a man dig a well in his land so close to that of his neighbour as to require a rib of stone or clay in his neighbour's land to retain the water, no action would lie for digging away the stone or clay upon his own property, and thereby letting out the water of the well. See *Brown v. Mallett*, 5 C. & P. 598.

From these, and indeed from a view of all the authorities cited on the different arguments, and judgments on them, I feel convinced that the defendant is liable for the injury occasioned by the falling of a wall built at the extremity of his ground, which I think it was his duty to have made safe without any external support, either from the subsoil, or the foundation of the wall on the adjoining premises. But I think it may become a material question in such a case whether the fall of the wall was occasioned by unskilful or negligent conduct on the part of the person injured, or of others than the defendant. *Dodd v. Holme*, 1 Ad. & El. 463, appears to me strong authority on this point. The question was raised, whether a party excavating his

soil near to, but without touching his neighbour's ground, is bound in law to protect his neighbour's foundation. The court do not hold that there is any such obligation, but sustain the action, because it was left to the jury to find whether the wall fell by reason of the defendant's negligent working upon his own land. It is difficult to see, from the report of the case, in what the negligence could have consisted; but, at all events, the question was considered a proper one. In the case before us the alleged negligence of the deceased was a point properly left to the jury, by whom it was negatived. *Trower v. Chadwick*, 3 Bing. N. C. 334, is strong authority on the same point.

As regards the question raised for the plaintiff, whether the negligence or contribution to the accident on the part of the deceased or of those who were working with him, was a proper one to be left to the jury under the plea of not guilty, it is not of consequence that we should dispose of it in the present judgment. If indeed we could decide that it required a special plea for the purpose of setting up the defence, that decision would have made further inquiry necessary. I think however, that it may be taken as a universal rule in actions upon the case for injury arising from negligence, that if the plaintiff by unlawfully negligent conduct on his side has even in part contributed to the accident, he cannot in a court of law sustain an action. This rule has been adopted in "running down cases" so as to have become a maxim, and herein is the difference between the law as administered by the Admiralty court and the law as given by the common law courts:—In cases before the Admiralty courts the rule is to adjudge the expense of repair, or the damages, according to the degree of fault on each side respectively; in the common law court the party suing, if in fault in any degree himself, is disabled from recovering. But he is disabled from recovering not simply because he contributed to the accident—for every ship which is run down by another sailing in a contrary direction by her own impetus and position contributes to the injury to herself; but the question is, whether the navigators of the plaintiff's ship unlawfully or negligently

helped to cause the injury, in which case the plaintiff cannot recover damages. This rule may, without any exception, be carried into cases on land, and I think into all actions for negligence, and I think it no less plain that the default on the part of the plaintiff may be given in evidence under the plea of not guilty.

Milman v. Dolive, 2 Camp. 378, was an action of trespass (not trespass in the case) for unmooring plaintiff's barge; under the plea of not guilty, the defendant was not permitted to prove that he removed it by plaintiff's authority. Knapp v. Salisbury was an action of trespass, for running with a cart against plaintiff's cart; defendant was not allowed, under the general issue, to prove that the chaise and cart were travelling in opposite directions, and that the collision happened from negligence or from inevitable accident. These cases have been cited to show that negligence or unlawful contribution to the injury should not be admitted to be proved under the plea of not guilty. The form of action, in my opinion, makes all the difference; trespass supposes a wilful injury, and it is not in nice distinctions of special pleaders, but in the rules of equity and common justice that the difference is found. In the first of these two cases the defence was in reality leave and license; the removal of the barge was wilful, and not occasioned by any fault on the part of the plaintiff; it should therefore have been pleaded specially. In the second case I think the decision was wrong, because the evidence offered, according to the report, went to prove that, whatever the fault on the part of the defendant might have been it was not intentional; as a defence it was not admissible under the general issue, but as a traverse of the plaintiff's declaration I think it was a good defence, and should have been admitted. In Webb v. Page, 6 M. & G. 196, it was adjudged that a carrier for hire could not set up under plea of not guilty, a misrepresentation as to the weight of the goods to be carried; for he had admitted by his plea of not guilty that he had received the goods safely to be delivered, The plaintiff in no way contributed to the injury, and the defence should have been specially pleaded.

I think that none of these cases, or any other that I have seen, counteract the principle that he who has contributed to a wrong, by his own wilful or negligent act, has no right to complain against his adversary because he also was wrong. In the case of wilful trespass, it never could be held a denial of the trespass that the plaintiff had himself been *negligent*; but when the action is founded upon neglect of duty on the part of the defendant, I think it follows that if the plaintiff has contributed to the injury by a neglect of duty on his part, he has no right to charge the defendant with the consequences.

Holden v. Liverpool New Gas Co., 3 C. & K. is a very interesting case, and directly in point. The decision of the learned judge is, that the defence is clearly admissible under the plea of not guilty in "case." Butterfield v. Forrester, 11 E. 60, was the case of an unlawful obstruction upon the highway, and Lord Ellenborough says:—"A party is not wilfully to cast himself upon an obstruction that has been made by the fault of another.—Marriott v. Stanley, 1 M. & G. 558; Lynch v. Nurdin, 1 Q. B. 29; Bridge v. Grand Junction R. W. Co., 3 M. & W. 244; Chauntler v. Robinson 4 E. 162. I think therefore that negligence on the part of the deceased would have been a good defence under the plea of not guilty. I think the learned Chief Justice properly left it to the jury to say whether the deceased had himself, by any negligent or improper act, contributed to the accident. Perhaps the charge might have been liable to objection on the part of the plaintiff in leaving it to be understood that if any act, however apparently prudent or lawful on the part of the deceased, had been the proximate cause of the accident, that the plaintiff should not recover; but even if the charge would bear this interpretation, the defendant had no right to complain—the charge was only the more in his favour. The exact boundary of the defendant's premises is not shown, and it may be that the deceased by unlawfully undermining the defendant's wall, in the defendant's own ground, caused the wall to fall; but that is not proved, as we are not informed as to the precise boundary line. Upon such evidence as the defendant adduced,

the jury negatived negligence or improper acts on the part of the deceased, and I see nothing upon which to predicate a decided opinion that they came to a wrong conclusion. I am of opinion therefore that the verdict should stand, and that the rule nisi should be discharged.

McLEAN, J. concurred.

Rule discharged.

DUNLOP V. ÆTNA INSURANCE COMPANY.

Action on policy of insurance—Joint contract.

A declaration on a policy of insurance, setting out a statement of facts from whence it may be inferred that the insurance was effected for the joint benefit of the plaintiff and another, held bad, for not distinctly averring the interest of the other, and that the action was brought in the joint account of the plaintiff and the other, shewn by the statements set out in the declaration to be interested in the goods insured.

This is an action on a policy of insurance not under seal, and the declaration states, among other things, that on the 6th February, 1851, by a policy of insurance made by defendants, defendants in consideration of 6*l.*, did insure the plaintiff against loss or damage by fire, to the amount of 400*l.* on the plaintiff's stock of groceries contained in a wooden building therein described, and promised and agreed to make good to plaintiff all such loss or damage by fire to the property specified in the said policy, for one year, to be paid within sixty days after notice and proof thereof made by the plaintiff in conformity to the conditions thereto annexed; and it was declared and agreed that the said policy was made in reference to such conditions, &c., and that after the making of the said policy, and before the loss by fire, &c.—to wit, on the 14th February, 1851—by a memorandum written on the said policy, the defendants admitted that the stock of goods insured thereby consisted, besides groceries, of dry goods, crockery, and hardware, with country produce, and stated that the parties insured then traded under the firm of Dunlop and Gibson; and the defendants did then agree that the said insurance and policy should cover such dry goods, crockery, hardware, and country produce, as well as said groceries.

That the 11th clause of the conditions annexed to said policy stipulated that all persons insured by defendants and sustaining loss by fire, were forthwith to give notice

thereof to defendants or their agent, and as soon after as possible deliver in a particular account of such loss or damage signed with their own hands and verified by their oath or affirmation, &c., and that they should also declare on oath what was the whole value of the subject insured, in what general manner as to trade, &c., the buildings insured or containing the subject insured, &c., were occupied at the time of the loss, who were the occupants, and how the fire originated, so far as known or believed, &c.; and that until such proofs, declarations, &c., were produced, the loss should not be deemed payable, and a copy of the written portion of the policy should be given in all cases in the affidavit of the claimant. It then alleges a total loss of all the goods insured, by fire, on the 27th February, 1851, exceeding in value the amount insured. That at the time of the making the said policy and from thence until the said fire, the plaintiff was and continued to be interested in the said stock of goods, &c., to the amount of the sum insured thereon by the defendants as aforesaid; and that forthwith, and as soon as possible after the said fire, to wit, on, &c., the said David Gibson gave notice thereof to the defendants' agent, with a particular account of the loss and damage sustained thereby, signed by him, the plaintiff, and the said David Gibson by their own hands and verified by their oaths, and then declared on oath that the whole value of the insured property was. And that the defendants then wholly waived, *released, and discharged* the plaintiff from the observance and performance of the *remainder* of the *conditions above recited*. And that afterwards and as soon as possible after the said fire, to wit, on, &c., the plaintiff caused the said Gibson, and the said Gibson did, on the plaintiff's behalf as well on his own, deliver unto the said agent a particular account of the said loss, signed with his hand and verified by his oath; and also declare, and he, the said Gibson, did on behalf of the said plaintiff and himself, declare upon oath what was the value of the whole property insured and in what general manner the building containing the said insured property and the several parts thereof was and were occupied at the time of the said loss,

and who the occupants thereof were, and when and how the fire originated, so far as he, the said Gibson, knew or believed, which said affidavit was delivered to the said agent together with a copy of the written portion of the said policy, &c.

Demurrer. Special causes assigned :

1st. That the declaration is vague, confused, and unintelligible, and it cannot be ascertained therefrom whether the plaintiff alone, or the plaintiff and Gibson, were the parties insured.

2nd. That it shews the cause of action to have accrued to the plaintiff and David Gibson, and not to the plaintiff alone.

3rd. That it alleges that plaintiff and the said David Gibson gave notice, whereas there was no previous notice from the said David Gibson.

4th. that the statement or declaration of plaintiff, required by the conditions of the policy, and alleged to have been made by the plaintiff, did not contain the particulars required by the said conditions, and was not in accordance with the same.

5th. And also that the statement, declaration, and affidavit, alleged to have been made by the said Gibson, was irrelevant and of no effect.

6th. That there was no allegation of any sufficient statement or declaration, as required by the said conditions, having been made by the plaintiff, or by him and Gibson.

Galt, for the demurrer, contended that the declaration was bad, that it showed two persons to have been insured, whereas the action was brought by one only, and so non-joinder of plaintiffs: that Gibson should have been a co-plaintiff.—*Sutherland Insurance Company v. Tierney (a)*; also, that the requirements of the conditions set out have not been complied with, or sufficiently excused: that what Gibson did for the plaintiff was done by the plaintiff within the meaning of the policy, and that the declaration was inconsistent in first alleging a release of certain conditions, and then averring their performance through Gibson. He relied strongly upon the inconsistency

(a) *Law Times*, 18th October, 1851, C. 33.

and uncertainty of the declaration as to who was insured, and who was really plaintiff, and who performed the conditions, &c.

Vankoughnet, Q. C., in reply, contended that one might insure for the benefit of another; that one partner might insure for all; at all events, he might insure to the extent of his own interest: that the plaintiff had an insurable interest to the full amount of the sum insured, and may sue alone: that what Gibson did was for his benefit, as being likewise insured, as the addition to the policy showed: that the plaintiff's affidavit, coupled with the release, sufficiently answering the conditions, part of them having been waived: that all alleged about Gibson was surplusage, and ought to be rejected. As to the name of *David* that the word said referred to Gibson, and sufficiently identifies the person as the same individual.—*Chauntler v. Leese et al.* 4 M. & W. 295; *S. C.* 5 M. & W. 698; *Poole v. Hill*, 6 M. & W. 835; *Sutherland v. Pratt et al.*, 11 M. & W. 296; *Skinner v. Stocks*, 4 B. & A. 437; *Doe d. Wright v. Mainfield*, M. & S. 294; *Arden v. Tucker*, 4 B. & Ad. 815; *Bourne v. Gatcliffe*, 3 M. & G. 689; 12 Ju. 1021; *Redmond v. Smith*, 7 M. & G. 457; *Hooper v. Lusby*, 4 Camp. 66; *Pim et al. v. Reid*, 9 M. & G. 1; *Chy. Jr. Forms* 132, note.

MACAULAY, C. J.—On reference to the cases *Page v. Fry*, 2 B. & P. 240; *Bell et al. v. Audley*, 16 East. 141; *Cohen v. Hannam*, 5 Taunt 101; *Lucena v. Crawford*, 3 B. & P. 75; and 1 Chitty, K. 49, it appears to me judgment should be given for the demurrer. Other cases I think, sufficiently show that the plaintiff, as being the party contracted with, might sue alone as a sole plaintiff, whether in his own behalf or for the joint benefit of himself and Gibson; but then the declaration should be consistent and show that the action was brought on his own account, or on the joint account of himself and partner. Now here he does not say whether the action is for his sole benefit or for the benefit of both: but the declaration contains a statement of circumstances from whence it may be inferred that it was for the joint benefit, without distinctly so stating; had the action been alleged to have been for both, the indorsement made

upon the policy on the 14th of February would have afforded evidence that both were insured on the 6th of February. But stated as it is, it is uncertain whether in the original it is said the parties insured *now trade* or *then traded*. In the former event, it would relate to the 14th, and not to the 6th of February, when the policy was effected; in the latter, it would relate to the 6th, and it ought to appear with certainty, for as it is left doubtful whether it means that the parties insured traded under the firm of Dunlop & Gibson at the time of the insurance, 6th of February, or only at the time of the indorsement, the 14th of February. But the most formidable objection is in the averment of the interest in the goods insured. Assuming that the indorsement of the 14th of February is merely explanatory of what was contemplated and meant the original insurance of the plaintiff's stock and groceries, and not as adding to or extending it to dry goods, crockery, hardware, and country produce, without any new or additional consideration therefor, and that the plaintiff and Gibson were mutually interested therein, and were jointly insured, and intended to have been so insured originally, it seems settled that in declaring upon policies of this kind, as well as policies of insurance upon ships, vessels, or cargoes, it is necessary to state the interest of the plaintiff, or the party or parties on whose behalf the insurance was effected, at the time of the insurance and of the loss. Now, although the declaration imports that both the plaintiff and Gibson were insured and interested in the goods on the 14th of February, and so continued until and at the time of the loss, still it is not so alleged; the plaintiff merely avers that at the time of making the policy, and thence until and at the fire he was and continued interested in the goods, &c., to the amount of the sum insured thereon, importing that he claims on his own behalf the whole amount of the insurance, and yet inconsistently introducing statements both before and after that averment, that imply a joint interest in Gibson. If therefore he was solely interested, in the policy or sum insured, nothing should have been said of Gibson, and if Gibson was equally or jointly interested it should have been dis-

tinctly so stated, and his interest should have been averred. In this respect the declaration seems to me faulty.

I lay no stress upon the 3rd clause of demurrer, respecting the name *David*, Gibson being sufficiently identified by the reference to him in the word *said*. Nor do I think the way in which compliance with the condition as set out is stated; if the action had been brought by the plaintiff alone, for and on behalf of himself and Gibson, and Gibson's interest in the subject matter had been averred, because it appears to me the object of the plaintiff is to show a compliance with such condition by both, that is as to himself part performance strictly and a release as to the residue, and as to Gibson complete performance of the whole, that part of the declaration following the alleged release of the plaintiff inconsistently and unnecessarily alleging that what Gibson did afterwards was caused by the plaintiff, and done by Gibson on the plaintiff's behalf as well as his own. The main ground on which I think the demurrer good is the omission by the plaintiff of the averment of any interest in Gibson at the time of the policy, or at the time of the fire or loss, although in other respects the declaration is framed as if he were a party insured and for whose benefit the action was brought. It is consistent with all that is alleged relative to Gibson's interest, that if he ever had any, he might have parted with it before loss by fire.

MCLEAN, J., and SULLIVAN, J., concurred.

Judgment for demurrer.

PARKS V. MAYBEE.

Promise cannot be avoided by infant's guardian—De injuria.

To a count in assumpsit for a breach of promise of marriage, the defendant pleaded that after the contract and promise, &c., and before breach—to wit, on &c.—it was agreed by and between defendant and one D. W., who then was the legal guardian of plaintiff who was then an infant, and by and with the concurrence and approbation of plaintiff, that the said contract and promise should be, and the same was thereupon rescinded by the defendant and plaintiff's guardian with the plaintiff's consent and concurrence.

Held, that the plea was bad, on the ground that the contract could only be avoided by the act of the infant, and not by the act of the guardian.

Held also, that the replication *de injuria* to the above plea is bad, on the ground that it is only good when the plea admits the breach of promise stated and excuses it.

Writ issued 12th March, 1851, Declaration 2nd September, 1851. Assumpsit for breach of promise of marriage,

one count only, laying mutual promises on the 1st January, 1847, and averring plaintiff's readiness to marry defendant, then avers that the defendant on 1st February, 1851, married Rosanna Moran, contrary to his promise to plaintiff, to her damage, &c.

4th Plea—that *after* the *contract* and *promise* mentioned in the declaration was made and entered into by defendant, and before any breach thereof by defendant, and before suit—to wit, on the 14th May, 1847—it was mutually agreed by and between defendant and David Williams, (then being the legal guardian of the plaintiff, who was then an infant and under age), and by and with the concurrence and approbation of the plaintiff, that the said contract and promise should then be and the same was therefrom wholly rescinded and abandoned, accordingly, by the defendant and plaintiff's said guardian David Williams, with the plaintiff's consent and concurrence : verification.

Replication, *de injuria*—that defendant of his own wrong, and without the cause by him alleged, broke his said promise in manner and form alleged : concluding to the country, &c.

Demurrer. Special causes :

1st. That the plea is in *discharge* of the *action* of plaintiff, who does not take issue upon any single fact therein, but puts in issue all the statements in said plea.

2nd. That the replication is double and bad for duplicity ; that the plea alleges a rescission of the contract before breach, and yet the replication, instead of denying it, alleges that the defendant broke his promise without the cause assigned, and so putting in issue several traversable facts.

3rd. That being a plea in discharge, the replication *de injuria* is bad, &c. : joinder in demurrer.

In the margin it is noted that the plaintiff objects to the sufficiency of the plea—

1st. That it does not confess and avoid, or traverse and deny the promise alleged.

2nd. That it tenders an immaterial issue.

3rd. Does not answer the whole declaration, setting up an agreement to rescind with Williams, the alleged guardian of the plaintiff, with her concurrence, which if true

is no answer to the declaration, as plaintiff's concurrence while a minor would not be binding upon her.

4th. Nor had said Williams any legal right to enter into such agreement on plaintiff's behalf while a minor.

5th. Nor does it shew how he became legal guardian of the plaintiff, or that he was in fact such guardian legally appointed.

6th. That the plea consists altogether of matter of law, on which no issue can be taken, and is no answer to the declaration, but is argumentative and defective.

Wallbridge, for the demurrer, contended that the replication was bad according to the 3rd resolution in *Crogate's* case, 8 Co. 67, on the ground that an authority was immediately derived from the plaintiff; in which event the plaintiff ought to answer it, and not reply generally *de injuria*—Also, because the plea was in discharge or denial, and not merely in excuse.—*Selby v. Bardoons*, 3 B. & Adol. 2.

Richards, in reply, contended that there was no such cause of special demurrer as that the plea relied upon authority from plaintiff.

That it is not a plea in discharge, which only applies to vested rights of action, whereas the matter relied upon had preceded any breach of the promise alleged.

That a plea of contract rescinded before breach is emphatically in excuse.—*Pontifex v. Wilkinson*, 1 C. B. 76; *Cattrell v. Lees*, 8 C. B. 113.

Also, that the plea is bad on general demurrer: that an infant could not during minority discharge a contract or promise valid or binding on an adult only by reason of its being in the eye of the law beneficial to the infant; and that any such agreement to discharge, though express, without any concurrent benefit, was not binding; and that here the defendant's discharging the plaintiff was no benefit or consideration, inasmuch as she was not bound, though he was; that a guardian as such had no right to rescind or repudiate the defendant's promise, and if the plaintiff's sanction warranted it, the defendant should have pleaded that she (and not the guardian) rescinded the contract and discharged him therefrom. But that, even had such been

the plea, it would not estop her from afterwards insisting on its performance.

MACAULAY, C. J.—With respect to the replication I think it is bad for the last cause of special demurrer assigned, as being in discharge or denial, and it is in effect a plea of discharge from the promise to marry before breach, and of denial of any breach; it expressly alleges such discharge, and argumentatively or impliedly, as a necessary inference, denies the breach of promise alleged, by shewing that no such promise existed at the time when, &c., that could have been broken. I do not find that to constitute a plea in discharge to which *de injuria* is inadmissible as a replication, such discharge was to be after breach or after a right of action had accrued and vested, which right of action was discharged as compared with a discharge from a subsisting executory contract or promise before breach, and therefore before any right of action could have vested; the gist of this plea is a discharge of the latter kind.

Without enumerating the cases applicable to *de injuria* as a replication in assumpsit, I shall refer to some in which the rescission of executory contracts before breach, or the substitution of them, has been in question.—Pearson et al. v. Pearson, 5 B. & Adol. 859; Langden v. Stokes, Cro. Car. 383; 2 Show. 417; 2 Lev. 214; Cro. Ja. 483, 619, 620; 5 Tyr. 373; Edwards v. Chapman, T. & G. 481; S. C. 1 M. & W. 231; S. C. 4 Dow. 731; a plea of rescission of the contract, in an action for goods sold and delivered, held bad on demurrer, a duty having arisen from the sale that could not be got rid of without an accord and satisfaction—see Thomas v. Shilliber, 1 M. & W. 124. King v. Gillett, 7 M. & W. 55—A plea that plaintiff absolved defendant from his promise to marry before breach held good on demurrer; the action was between two adults. Rogers v. Custance, 1 Q. B. 77; 2 Saund. 295 note—A discharge of the contract before breach, is mentioned as one instance in which the replication of *de injuria* is not admissible. In Purchell v. Salter, 1 Q. B. 207, Lord Denman said, “Pleas in discharge, as distinguished from pleas in excuse, are when the matter of the plea bears upon and applies to the

debt itself and puts an end to it ;” of which sort, among other instances suggested by him, was discharge of the contract before breach. *Edwards v. Greenwood*, 5 Bing. N. S. 476—It does not clearly appear, but was assumed by the court, that the alleged satisfaction by the substitution of a bill of exchange for a promissory note was after breach. In *Herbert v. Sayer*, 5 Q. B. 972; Lord Denman said if the party with whom the direct transaction was alleged had been plaintiff, it might have been in discharge; but as it was, the plea amounted only to an excuse. *Pontifex v. Wilkinson*, 1 C. B. 76—The 4th plea was one of mutual discharge before breach to which plaintiff replied *de injuria*, and defendant joined issue thereto without objection. *Short v. Stone*, 8 Q. B. 358 note. The third plea was of a like kind, to which plaintiff replied denying the agreement and rescinding. *Jones v. Senior*, 4 M. & W. 123; *Humphreys v. O’Connell*, 7 M. & W. 370; *Cowper v. Garbett*, 13 M. & W. 33; *Schild v. Kilpin*, 8 M. & W. 676—That a replication *de injuria* is only good when the plea admits a breach of the promise stated and excuses it, not if it is a denial of the breach, though only argumentatively so—8 C. B. 113; *Bench v. Merrick*, 1 C. & K. 63—In breach of promise of marriage defendant pleaded misconduct of plaintiff, to which *de injuria* was replied, and no doubt correctly.—*Morgan v. Price*, 4 Ex. R. 615. But I am of opinion that the plea is bad even on general demurrer; the plea alleges the agreement to have been by and between the defendant and Williams, then being the legal guardian of plaintiff, who was under age—not saying as guardian or on her behalf, but by and with her consent and approbation that the contract and promise mentioned in the declaration should then be and the same was thereupon wholly rescinded and abandoned by the defendant and plaintiff’s said guardian—not saying *as such* or on *her* behalf, but with her consent and concurrence.

The utmost that can be said of this is, that the plaintiff concurred in, consented to, and approved of her guardian agreeing with defendant to rescind and abandon the contract and promise: still she was no party to it personally

unless the word "concurrence" imports it. My impression is, that this word does no more than import an acquiescence at the time, not that she was *actually present* and a party to the arrangement. Her consent may have preceded it. That an infant may hold an adult to a promise to marry though not reciprocally bound, was held in *Holt v. Ward, Fitzgibbon* 175, 275; S. C. 3 Atk. 306; S. C. 2 Strange 937 and S. C. 3 Ba. Ab. 574.

It is consistent with the plea in this case that the plaintiff was of an age sufficient to enter into actual marriage with consent of parents or guardians, and that her alleged guardian had assented to the contract in question; the contrary is not alleged, nor is any new consideration, beneficial to the plaintiff, for the rescission pleaded or alleged; and if there was a valuable consideration as between the defendant and Williams, (which is not averred), the plaintiff would not appear to have had a beneficial interest therein or been entitled to sue therefor.

Cases having relation to this question are such as 1 Vent. 9; *Carter v. Collingwood*, ib., 297; *Crow v. Rogers*, 1 Stra. 592; 2 Lev. 210; *Wilson v. Coupland*, 5 B. & Al. 228; *Price v. Easton*, 4 B. & Ad. 433; *Wharton v. Walker*, 4 B. & C. 163; *Fitzmaurice v. Waugh*, 3 D. & R. 273, and cases cited ib. How Williams was plaintiff's guardian is not alleged, nor was any authority cited to shew that his act, in agreeing to rescind the defendant's contract and promise (even with the plaintiff's consent and approbation), bound her. The case of *Morgan v. Thorne*, 7 M. & W. 400, shews that an action brought by a prochein amy, appointed by the court as bringing an action of crim. con. without the knowledge or direction of the plaintiff, an infant was binding upon him, and the case of *Foote v. Hayne*, 1 C. & P. 545, is in point to show under what circumstances the acts of the plaintiff's father in corresponding with the defendant (she being of full age) bind her; but it is clear an infant cannot appoint an attorney to act for him or her, as to confess judgment—*Oliver v. Woodroffe*, 4 M. & W. 650; 1 C. M. & R. 651; *Dixon on Deeds*, 472; 2 Saund. 212 (4). However necessary the consent of a

guardian may be to a marriage contract, *de presenti*, or actual marriage, it does not follow that such guardian can rescind a contract of marriage in futuro or executory with the consent, concurrence, or approbation of the infant. 1 Bu. C. C. 3, Drury v. Drury; Bro. P. C. 60; Wilmot's opinions, 177; Theobald v. Duffoy; 9 Mod. 103; Caines v. Smith. 15 M. & W. 189; shew the importance of allegations being specific.

Now it appears to me that if the plaintiff did anything or said anything to discharge the defendant it ought to have been so pleaded as her act and not her guardian's; that an infant during her minority might *avoid* a contract of this kind, while executory, seems to follow from the decision in the Newry and Enniskillen Railway Co. v. Combe, 3 Ex. R. 565; but then it must be the act of the infant.—The Cork and Bandon Railway Co. v. Gaze, 10 Q. B. 935; Holmes v. Blogg, 8 Taunt. 35; Holmes v. Blogg, *ib.* 508; S. C. 2 Moore 552.

The Leeds and Thirsk Railway Co. v. Farnley—If material, this case determined that on these pleadings it can not be intended the plaintiff is not a minor still, although she has declared by attorney; vide Fitzmaurice v. Waugh, 3 D. & R. 273, *contra*. The case might be reversed by supposing the defendant had sought to hold the plaintiff responsible; and if otherwise liable, would it be a good plea on her part that she being then a minor, Williams, her guardian, and the defendant had agreed to rescind the contract with her concurrence, &c.? I apprehend not, and that such a plea would be bad for not pleading the fact that she and defendant mutually agreed to rescind it, instead of merely stating facts which might constitute evidence thereof or whence it might be inferred. The only doubt is whether the plea is merely informal and the objection not open on general demurrer. Bell v. Tuckett, 3 M. & G. 785—That if a good plea the plaintiff might have traversed both the alleged agreement and her concurrence, and had she done so, her concurrence would have formed a material part of the issue, and the difficulty is that mere concurrence, consent, or approbation during minority on her guardian's agreeing

to put an end to the contract would not be a direct act on her part, but the excuse of a delegated authority on his—not an act done by her or by him in her name nor for her benefit; and if it was, it is not so pleaded. It is not pleaded that she repudiated or agreed to rescind, but that Williams, her guardian did, with her concurrence, without saying and on her behalf.

The privilege of avoiding that which is not void but only voidable, as this contract clearly was, is said to be a personal privilege, of which no one can take advantage but the infant.—Smith v. Bovin, 1 Mod. 25; Bugbeau on Infancy, 37, 38; Zouch v. Parsons, 3 Bur. 1794; S. C. 3 Bur. 1808; McPherson on Infants, 461, 477, 478; 3 Doug. 65; 2 H. B. 515; Gray v. Cookson, 16 East. 13; 4 T. R. 196; Smedley v. Gooden, 3 M. & S. 189; Hargrave v. Hargrave, 12 Bevan, 408.

Rested upon the authority of Williams merely as guardian, I think he had no power to exonerate the defendant; as between him and defendant it was a *nudum pactum*, and without mutuality of consideration, Williams agreeing to rescind it, being no consideration for the defendant's doing so, for want of privity in the contract, and if invalid as to one party it was equally so to the other, taking it in conjunction with her concurrence. I think it would fail as being a delegated act then, in which he nevertheless acted as principal and not as her agent, and on her behalf; and if he had, the act to bind her should have been formal and tantamount to a *repudiation* of the agreement by her, when the matter pleaded does not appear to me to amount to. No instrument in writing signed or executed by an agent or one exercising a delegated authority in his own name, would be invalid to bind the principal, though said to be with the concurrence of such principal.—Dixon on Deeds, 532; Paley on Agency, 180-1-2-3 and 308; Moor. 818; 2 Bur. 1188; 2 D. & R. 273.

On the whole I am not satisfied the concurrence, consent, and approbation alleged, amount in law to such a rescission or repudiation of the contract by the plaintiff while a minor, as to bind her to the cancellation or avoidance, as an act of

her own ; it seems to me the same as if a mere stranger had agreed with the defendant to rescind it with her acquiescence, in opposition to which, she now by bringing this action disaffirms the act, or any repudiation on her part, binding or conclusive upon her as a discharge of the defendant ; and that judgment should be given against the plea on this demurrer.

As to the binding effects of transactions by or on behalf of infants in equity, I may refer to *Theobald v. Duffoy*, 9 Mod. 103, *Bennett v. Lee*, 3 Atk. 489.

McLEAN, J.—The objections to the plea having been urged on the argument, it becomes necessary first to inquire whether in truth the plea is a sufficient answer to the declaration, as it is only in the event of its being so that the consideration of the replication becomes necessary or important. The plea alleges an agreement made with one David Williams, *than being* the legal guardian of the plaintiff, an infant under age, *with the concurrence and approbation* of the plaintiff, that the contract of marriage should be rescinded and abandoned, and that the same was accordingly rescinded and abandoned *by the defendant and the plaintiff's said guardian*, with the plaintiff's *consent and concurrence*. It is not alleged that any agreement was entered into *between the plaintiff and defendant* to rescind the contract, or that the contract was abandoned by plaintiff, but the agreement is stated to have been with her legal guardian, with her assent and concurrence, and that *he* and the *defendant*, by her *consent and concurrence*, rescinded and abandoned the contract. Now, if it is admitted that an infant female may agree, with the approbation of her guardian, to abandon a contract of marriage, or any other advantageous contract there is no allegation in the plea that that was the case in this particular instance, for the agreement is not alleged to be with the plaintiff but with her guardian, who could have no right to make such an agreement for his ward, and he it is who is alleged to have rescinded and abandoned the contract. *His* rescission and abandonment of the contract, with her concurrence, does not amount to a rescission of it by the plaintiff. It was a contract between the plaintiff

and defendant, and, under any circumstances, could only be put an end to by the parties who made it. One of those parties, judging from the allegations in the plea, does not appear to have been a party to the agreement to rescind, and all that is stated as to her part of the matter is, that she concurred and assented to what a person, alleged to have been her guardian, did in the matter; such consent to what another person did, could not be binding on the plaintiff, unless she was actually a party to the agreement made through such person, and cannot be taken to amount to an *agreement* on her part to rescind and abandon the contract. If she was a party to the agreement, and her guardian was assenting, then the plea should have alleged the agreement to have been made *by the defendant with the plaintiff*, with the concurrence of her guardian; and the question would then have arisen whether, being a minor, any agreement, even with the consent of her guardian, to rescind and put an end to such a contract as the one declared on would be binding; at present it does not appear to me that it is necessary to consider that point, inasmuch as the plea does not allege that the contract was in fact rescinded or abandoned under any agreement with the plaintiff, and therefore does not set up any defence to the action. The plea, I think, is bad on these grounds; and this being the case, it is unnecessary to go into the question as to the demurrer.

SULLIVAN, J., concurred.

Judgment against the plea on the demurrer.

RIGNEY V. MITCHELL AND McMASTER.

Under what circumstances the property in chattels vests in a vendee by the contract of sale.

In an action of trover for wheat and flour of the plaintiff, it appeared that H. K. & Son, being the owners of a grist mill, on the 14th October, 1851, applied to the plaintiff's agent for an advance upon 5000 bushels of wheat alleged by them to be in the mill, for which they produced the warehouse receipt. The agent preferred purchasing the wheat for the plaintiff, and they therefore gave him the following receipt: "£500 Received from R. A. G. agent, for Thomas Rigney, New York, £500 on account 5000 bushels of wheat sold him at 2s. 9d. per bushel. Toronto, 14th October, 1851. (signed) H. K. & Son." And he thereupon paid £500, minus his charge for agency and brokerage. The wheat in the mill was on the same day insured by H. K. & Son at the request of the plaintiff's agent, in their own names, the policy providing that in case of loss the amount should be paid to the plaintiff. The agent then agreed with H. K. & Son for grinding 5000 bushels of wheat at their mill before 1st January following, and he debited them with the £500 paid on account. On the

16th October the plaintiff's agent went to the mill and took a sample of the wheat, but as it appeared, without the knowledge of H. K. & Son or their servants. No delivery of any part was at this time or previously made. On the 18th, the agent without any further communication with the parties, made out bought and sold notes, and transmitted the bought note by letter to the plaintiff, and delivered the sold note to one of the firm of H. K. & Son, directing them at the same time to deliver the flour as ground, marked [R] to a wharfinger in Toronto for shipment to the plaintiff at New York. On the 31st October H. K. & Son assigned all their property to the defendants, who duly registered the assignment, and on the 4th November H. K. & Son delivered possession to the defendants' clerk, which possession was continued thenceforward by the defendants. On the 5th November the plaintiff's agent took a formal delivery at the mill of all the wheat and flour there, being 348 barrels of flour and 1500 bushels of wheat, (the defendants' clerk being on the premises but not interfering), and again directed that it should be sent to Toronto. None of the flour at that time had been marked [R], but 300 barrels were so marked on this occasion. The flour was not sent, as the defendants' agent forbade the teamsters to take it, and on the 7th November he obtained possession for the defendants of all the wheat and flour in the mill, which was afterwards shipped on defendants' account—some it being marked [R]—and being 670 barrels in all.

At the trial evidence was given by the miller of H. K. & Son as to the quantity of wheat in the mill on the 18th October, and of the flour delivered from the mill before the assignment to the defendants, upon which the defendant's contended that from the proved course of business in the mill, none of the identical wheat in the mill at the time of the sale to the plaintiff could have been manufactured into the flour of which the defendants had taken possession under the assignment. The jury found a verdict for the plaintiff, with £344 3s. 4d. damages. The court made absolute a rule for a new trial upon payment of costs, holding that the evidence left it doubtful whether the property in any wheat ever vested in the plaintiff; and 2ndly, that the weight of evidence rendered it probable that no part of the wheat in the mill at the time of the contract with the plaintiff came into the defendants' possession.

Writ issued 26th November, 1851. Declaration dated 3rd December, 1851.

Declaration, one count in trover for 10,000 bushels of wheat, 10,000 bushels of wheat manufactured into flour, and 10,000 barrels of flour. Damages laid at 1000*l*.

Pleas: 1st. Not guilty and issue.

2nd. Plaintiff not possessed, and issue.

The case was tried before Mr. Justice Draper, at the January Assizes, 1852, held at Toronto, in and for the united counties of York, Ontario, and Peel, when it appeared in evidence that certain persons trading under the name or firm of Hughes, Kline & Son, owned a grist mill, &c., in the township of Vaughan, at a place called Klineburg: that on the 14th of October, 1851, Kline the younger, on behalf of his firm, applied to Goodenough, who was the plaintiff's agent in the city of Toronto, for advances on property, saying they had 5000 bushels of wheat, and indeed representing that they had as much as 6000 bushels, and being asked for a warehouse receipt, delivered a receipt in writing as follows:

"Received in store at Klineburg mills store-house, Vaughan, 5000 bushels of wheat, subject *to the order of the plaintiff*, to be shipped by first conveyance, in flour or wheat, for sale in New York or Toronto.

(Signed) "HUGHES, KLINE & SON."

"Toronto, 14th October, 1851,"

That Goodenough, hesitating to act on this receipt, took advice, and in consequence agreed with Kline, junior, on the same day *to purchase* 5000 bushels of wheat, making it a transaction of sale and purchase, and took another receipt as follows:

"£500

"Received from R. A. Goodenough, agent for the plaintiff, New York, 500*l.*, on account 5000 bushels of wheat *sold* him at 2*s.* 9*d.* per bushel.

(Signed) "HUGHES, KLINE & Son."

"Toronto, 14th October, 1851."

He also required the wheat to be insured, which was done in the following form:

Ætna Insurance Company.

"Messrs, Hughes, Kline & Son; October 14, 1851, for two months, on wheat, flour, flour barrels, and mill offal, contained in a wooden grist mill and store attached, belonging to Mr. N. Kline, *senior*, situate at Klineburg, township of Vaughan—isolated. In case of loss the amount to be paid to Thomas Rigney, Esquire."

No premium or amount being mentioned; whereupon Goodenough drew a bill of exchange, at sixty days, on the plaintiff at New York, in favour of Kline & Son, who endorsed it to the City Bank, where it was discounted and the proceeds placed to Goodenough's credit, who drew a check in favour of Kline & Son for the amount, and they gave the receipt for 500*l.*, the brokerage and discount having in fact been deducted from that sum. On the same day Goodenough made an arrangement with Kline & Son for grinding wheat, as follows:

Toronto, 14th October, 1851.

"We hereby agree to flour any quantity of wheat at our mill, at Klineburg, under 5000 bushels, to 1st January next, at 3*s.* 9*d.* per barrel, including teaming into Toronto.

(Signed) HUGHES, KLINE & SON."

On the 14th October, Goodenough debited Kline & Co. with the money actually advanced to them; Kline, junior, left Toronto on the 14th October, and Goodenough did not see

him in Toronto again until on or after the 18th of that month, though he had expected to see him on the 16th, 17th, or 18th; on the 16th of October Goodenough went out to Klines' mill, to see the wheat, and to be sure they had it there, and being satisfied on that point, he took a sample of the wheat and brought it away, without the knowledge of Kline or the miller that he knew; nothing was said on that occasion about delivery: on the 18th of October, without any further communication with any of the parties, Goodenough made out bought and sold notes, the bought note being as follows:

Toronto, 18th October, 1851.

"Mr. Thomas Rigney, 121 Pearl Street, New York:

"I have this day bought for your account, from Hughes, Kline & Son, Klineburg, 5000 bushels of wheat (as per sample), now in store at Klineburg, at 2s. 9d. per bushel of 60 lbs., subject to order of R. A. Goodenough, agent.—Terms cash.

"Your obedient servant,

(Signed) "R. A. GOODENOUGH, *Broker.*"

The sold note was not produced, but was proved by the entry in Goodenough's book; it was said to vary from the bought note as not including the words "as per sample:" on the same day, the 18th of October, Goodenough transmitted the bought note to the plaintiff, and the sold note he delivered to Kline, junior, at his office in Toronto—as he thought, but could not positively assert, it was on the 18th that he handed it to him; by a letter, dated 18th of October, Goodenough wrote to Kline & Son, saying:

"You will please grind what wheat you have on hand for Thomas Rigney, of New York, at your mills, and deliver the flour at James Browne's wharf, Toronto, for shipment, at your earliest convenience; be particular and have the barrels well secured with good strong hoops, well nailed, as the barrels get much more abuse in the fall than at any other time, owing to late shipments. Mark the barrels at your mill [R] and oblige

(Signed) "R. A. GOODENOUGH, *Produce Agent.*"

Nothing further seems to have been done till the 31st of October, and on that day Kline & Son assigned all their property to the defendants to pay themselves in full for certain acceptances for Kline's accommodation, and the residue for the benefit of all their creditors, *pari passu*, and the said assignment was registered: on the 3rd November,

1851, a clerk or agent of defendants went out to the mill to take possession of the property for defendants, as such assignees, and on the following morning Kline put him in possession, and he took possession of the mill, stores, property, and everything there, and continued in possession til the time of the trial; he commenced taking stock and making schedules, &c.

The plaintiff having seen the assignment or a copy thereof in the registry office, went out to the mill on the 5th November, and took a formal delivery of all the flour there, 348 barrels, and 1500 bushels of wheat; none of the flour had been marked [R], but the barrels were so marked on this occasion, one or two by Goodenough himself, and three hundred in all were marked; the wheat was on the third floor of the mill.

Goodenough asked Kline if he had any accounts unsettled in town before the 18th of October, and he said he owed 90*l.* or so to Mr. J. O. Heward; and Goodenough advised him to give Mr. Heward enough to settle with him, and there would still remain enough for plaintiff, according to Kline's representation of what he had: and Goodenough wished to be clear of former bargains. At this time, that is, on the 5th of November, defendants' agent was at the shop taking stock, but did not seem to interfere with the mill or interpose, but said he had forbid Kline sending the flour to town, and had acted by orders, he having simply countermanded the teamsters bringing it in for the plaintiff. No flour coming in, Goodenough in a day or two returned to the mill and found the plaintiff's mark scratched off the flour barrels, and was told the defendant's agent had taken possession; some of the barrels had been removed. Goodenough remarked such as he could find, and got into the mill and took possession of the wheat and flour there; but the defendants' agent came, also Kline and Hughes, and the agent insisted upon having possession, and eventually got possession of the wheat and flour in the mill early on the morning of the 7th November. The flour was afterwards shipped on the defendants' account from Gorrie's wharf in Toronto to Montreal, some of it being marked [R]—670

barrels in all. The wheat and flour in the mill would have covered the plaintiff's advance to Kline and Son, but he never got any of it. The flour and wheat so converted by the defendants constituted the ground of this action.

At the close of the plaintiff's case the defendants' counsel objected.

1st, That there was no sufficient proof of a tortious conversion.

2nd, That defendants had not been proved to be assignees.

3rd, That Goodenough had no authority to make bought and sold notes on the 18th October, or to affect the transaction, as it took place on the 14th.

4th, That restricted to the 14th of October, there was no sufficient evidence to vest in the plaintiff the property in any specific wheat or flour, not being identified or separated from the whole or greater quantity alleged to be in the mill, nor delivered.

5th, That there was no delivery until the 5th of November, and since that no proof of a conversion.

The learned judge ruled that the points properly formed questions of fact for the jury.

On the defence evidence was given by Klines' miller and others, to the effect that there are three floors in the storehouse to put wheat in: that when received machinery carries it to the upper floor whence it passes through holes to the lower ones, and thence by machinery to the smut mill, and thence to the stones; wherefore the earliest stowed wheat would be the first ground: that the lower floor would contain about 6000 bushels: that it was not much more than one-third full on the 14th or 18th of October last, and that there might have been three bushels in the upper and sixty in the middle floor: that the miller kept an account of all the wheat received and flour delivered, and produced his books in court, which showed that between the 18th of October and the 4th of November, 2466 and 459 bushels of wheat were received, making together 2925 bushels: that four bushels and twenty-five pounds make a barrel of flour; wherefore 2925 bushels would yield 672 barrels of flour;

that between the 18th of October and the 4th of November, 120 barrels of flour were delivered at Maitland's wharf, 347 at Browne's wharf, and elsewhere twenty-one, making in all 515 barrels : that the defendants got from the 6th to the 12th of November 670 barrels at Gorrie's wharf : that 515 barrels would require 2312 bushels, and that there was not more than that quantity in the mill on the 18th of October, whence it was submitted that no part of the wheat in the mill on the 18th of October formed part of the 670 barrels of flour which the defendants received. On cross-examination the miller said that on the 1st of November 110 bushels of wheat were taken into the mill, on the 3rd 78, on the 4th 25, and on the 5th none : that on the 14th of October there was not much more than 2000 bushels in the mill ; that 42 barrels of flour were delivered out between the 1st and 3rd of November : that, including what was there on the 14th of October, there was in the mill up to the 4th November 5237 bushels, which were ground. The defendants' agent positively asserted that he received possession on the 14th of November, and that he so notified Goodenough, and forbid his intermeddling, &c. : that on the morning of the 4th of November there were only 296 barrels of flour in the mill, and that the rest of the 670 barrels was made out of wheat then in the mill : that the schedules were completed by the 8th or 9th of November, and the 670 barrels flour delivered at Toronto by the 10th or 12th of that month : that he received the mill on the 4th, and worked it thenceforth, being liable to, and paying the workmen, &c.

The learned judge left it to the jury, saying the plaintiff undertook to establish his right to certain specific property, and the first question was, whether he had made out such right to 5000 bushels of wheat, or any other quantity : that as to the bought and sold notes of the 18th October, were they made by the authority of vendor and vendee ?

As to delivery, that there was evidence of actual possession received on the 5th November, sufficient, with the bought and sold notes, to establish the identity of the property, and to entitle the plaintiff *prima facie* to maintain the action ; and that there was evidence of a conversion.

That the first writing of the 14th October, the warehousing receipt, was insufficient as to any part of the wheat in the mill on the 5th November, not proving any identity between the wheat therein mentioned and that afterwards converted: that the jury were to determine whether there was a sale and purchase inchoate on the 14th October, and carried out by the bought and sold notes of the 18th October; to arrive at which conclusion they should be satisfied that the latter act was connected with and formed part of the transaction of the 14th, and was done by the authority of vendor and vendee: that the authority of the vendee was not questioned—the point was, whether Goodenough had authority from Kline & Son, the vendors: that if Kline accepted the sold note on the 18th from Goodenough, that would afford evidence of his assent. Then the question would arise whether Kline & Son had 5000 bushels of wheat for the sale to operate upon, or was it only a contract to sell and deliver so much grain, not being then in their possession, or not then their property; also, whether there was any delivery of the 5000 bushels or any part thereof, so as to complete the right of property in plaintiff to any specific wheat, and if so, to how much. That if the bought and sold notes were made by proper authority—that is, if Goodenough was broker for both parties, the property in any wheat of Kline's in the mill when they were made vested in plaintiff; and if any of that wheat was afterwards made into flour, it would continue his; and if defendants afterwards converted any wheat or flour which thus belonged to plaintiff, they were liable—explaining that it was not enough that defendants got 670 barrels of flour from Kline & Co.'s mill, of which there was no doubt but that some of these barrels must be the property of plaintiff, made out of wheat sold and transferred by Kline & Son to him.

If the jury found for the plaintiff to the full extent, then it would be proper to deduct £92 in reference to Goodenough's assent to Heward being paid that amount, &c.

The jury found for the plaintiff £344 3s. 4d. damages, being about 2500 bushels at 2s. 9d., or half the quantity claimed by the plaintiff; £500 would pay for 3636 bushels at 2s. 9d.

During last term, *Hagarty*, Q. C., obtained a rule calling on the plaintiff to shew cause why such verdict should not be set aside and a new trial granted without costs, as being contrary to law and evidence, the judge's charge, and perverse, and for the admission of improper evidence, and for misdirection.

Cause was shown by *Crooks*, for plaintiff, during the same term. He contended there was no pretence for a new trial without payment of costs—*Sutton v. Mitchel*, 1 T. R. 20; *Doe d. Smith v. Pike* 1 N. & M. 385; and that there was no sufficient grounds for a new trial at all; that the whole case resolved itself into questions of fact, which were left openly and fairly to the jury: that there was evidence of a sale on the 14th October, and of authority in the broker to make the bought and sold notes on the 18th as resulting from it, or by subsequent acquiescence: that Kline never objected to it, even on the 13th November, when Goodenough went out to the mill: that there was evidence of more wheat then being in store than the jury found for plaintiff; and that the property passed by virtue of the sale and payment of the greater portion of the price; that the insurance and other acts of Kline amounted to a specific appropriation, sufficient to vest the property in plaintiff: and, as to the conversion, that it was for the jury to say whether of the 5000 bushels said to be in store on the 14th October, defendant did not receive and convert as much as 2500 in the grain or in the shape of flour; he admitted the onus was on plaintiff to prove both that the property was his, and that defendants had converted it—*Wilkinson v. Payne*, 4 T. R. 468; *Deacle v. Hancock*, 13 Price 226.

Hagarty, Q. C., and *Connor*, Q. C., in reply, contended there was no evidence to go to the jury: that the transactions of the 14th October, were all that took place by due authority, and did not identify or confer upon plaintiff the right of property in any specific wheat: that the sum paid Kline was not on a purchase, but an advance upon the contract to grind: that the wheat was insured as Kline's: that no valid sale took place on the 14th, and that the broker had no authority to superadd bought and sold notes

on the 18th, to alter or affect the nature of the dealings between him and Kline on the 14th: that on the 16th of October, Goodenough neither asked for nor took possession evincing the inchoate nature of the contract for any specific wheat: that a sample was taken secretly and without Kline's privity: that the sold notes of the 18th October, do not correspond as seen upon comparison: and, after examining the facts in evidence with special attention to dates, &c., they submitted that no flour or wheat defendants took under the assignment, was identical with any that could have become the plaintiff's property on the 14th or 18th October—*Davis v. Brown* 4 U. C. Q. B. R. 168; *Brayan v. Nix*, 4 M. & W. 775; *Goom v. Aflalo*, 6 B. & C. 117; *Willis v. Woodward*, 20 L. J. Ex. 261: that deducting £90 in favour of Heward, the verdict was manifestly excessive, the value of the goods being the measure of damages in trover: that plaintiff relied on three transactions—1st, that of the 14th October; 2nd, that of the 18th; and 3rd, that of the 5th November, when delivery was had, but all failed; the first, as not amounting to a sale, and waived by the second; the second, as unauthorized and varying “as to sample;” and the third, as being after a sale and delivery to defendants for the benefit of the Kline's creditors—*Reed v. Deere*, 7 B. & C. 261; *Johnson v. Dodson*, 2 M. & W. 653; *Rhode v. Thwaites*, 6 B. & C. 388; *Mellin v. Taylor*, 3 N. S. 109.

MACAULAY, C. J.—To maintain trover under pleas of not guilty and not possessed, the plaintiff must prove a right of property and a right of possession—*Williams on P. Property*, 23-4; *Gordon v. Harper*, 7 T. R. 11, 12, 13; *Bloxam v. Sanders*, 4 B. & C. 941, 950; *Addison v. Roundum*, 4 A. & E. 799; 6 N. S. 349; *Leg v. Evans*, 6 M. & W. 36; *Leake v. Loveday*, 4 M. & G. 972; *Sarling v. Baxter*, 6 B. & C. 374.

Many cases arise between vendors and vendees; here, though it occurs between the vendee and the assignees of the vendor, for the benefit of his creditors, the right of property and the right of possession are distinct from each other; the right of property may vest in the buyers by the

contract of sale, but the right of possession is not transferred till payment of the price. See the cases *supra*.

The right of a vendee suing as a plaintiff in trover may be ascertained by reference to actions of assumpsit by vendors, for goods bargained and sold, and goods sold and delivered.

Generally speaking, upon all sales of goods in possession, where the contract is valid, or earnest paid, or part delivered, the property is changed, though possession be not had by the vendee, as if the vendor retains a lien for the price, &c.

Cases analogous to the present, are those in which something has remained to be done by the vendor to ascertain the quantity, price, or individuality of the article, or by the vendee, as payment of the price.

Goodall v. Skelton, 2 H. B. 316, is a case of goods sold, but not delivered, the vendor holding them under his lien for the price. See also *Rawson v. Johnson*, 2 East. 203; *Boulton v. Arnott*, 3 Tyr. 267; *Dixon v. Yates*, 5 B. & Ad. 313; *Lackington v. Atherton*, 7 M. & G. 360. The earlier cases are referred to in *Hanson v. Meyer*, 6 East 614, which was trover for starch, and held not to lie, the property not having vested, for want of weighing which was to presede the delivery and to ascertain the price: Lord Ellenborough there said, "if anything remains to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property is not attached on the buyer." *Whitehouse v. Frost*, 12 East. 614—Trover for ten tons of oil out of forty in the same cistern, and paid for, and the assignee of plaintiff held entitled to recover. This case has been since questioned, but I believe not overruled.—*Austen v. Craven*, 4 Taunt. 644; Trover held not to lie for want of separation and identity. *White v. Wilks*, 5 Taunt. 176; S. C. 1 Mar. 2; *Shepley v. Davis*, 5 Taunt. 617; S. C. 1 Mar. 252; *Rugg v. Minnett*, 11 East. 210; *Busk v. Davis*, 2 M. & S. 397—Trover for ten out of eighteen tons of flax, which required to be weighed to identify the goods to be delivered, held not to lie, the identity or individuality of the thing to be delivered not being ascertained. *Jackson v. Anderson*,

4 Taunt. 24—Trover maintained for 1,900 dollars, part of 4,700 which one Laycock had received, but though mixed, they were the plaintiff's property, independently of Laycock or defendant, who had disposed of all the dollars.—Wallace v. Breeds, 13 East. 522; Trover for fifty out of ninety tons of oil, held not to lie: Zagury v. Funnell, 2 Cam. N. P. C. 240; Withers v. Lyss, 4 Cam. N. P. C. 237; Holt, N. P. C. 18 S. C.; and see *ib.* note, p. 23. Simmons v. Swift, 5 B. & C. 857; Assumpsit for bark sold and delivered, where the rule as to transfer of property, risk, &c., is well explained; Horsefall v. Fauntleroy, 5 M. & R. 657; Clarke et al. v. Spence, 6 N. & M. 406; Morton's Law of Vendors, 255, note 314, 317; 2 Saund. 47 P. (L.); Rhode v. Thwaites, 6 B. & C. 388; 9 D. & R. S. C.; Williams on Personal Property, 22, 35; Dixon v. Yates, 5 B. & Adol. 313; Swanwick v. Sotheron, 9 A. & E. 895; Trover for 1028 bushels of oats; pleas, not guilty, and not the plaintiff's property. The oats were proved to be in a particular bin, No. 40; no other oats were in the same bin; the warehouseman accepted the delivery order, and entered it in his book. Held maintainable, the *identity* and quantity of the goods being known. Bryans v. Nix, 4 M. & W. 775; Wait v. Baker, 2 Ex. R. 1 Parke, B.—“The property does not pass until there is a bargain with respect to a specific article and every thing is done which, according to the intention of the parties was necessary to transfer the property in it; the meaning of appropriation is much discussed in this case.—Martindale v. Smith, 1 Q. B. 389; Wiles v. Woodward, 20 L. J. Ex. 261.

In applying such cases as the foregoing to the present, the first consideration is the nature of the plaintiff's dealing with Kline and Son, and secondly its effect. It was apparently contemplated originally that 5000 bushels of wheat should be pledged to the plaintiff to secure him in advancing money, to be sold through his agent, and for his benefit—the warehouse receipt, and insurance memorandum of the 14th of October, have this appearance: but when the character of it was changed from a mere pledge into a sale, on

the same day and before the money was advanced, I think all the written papers of that day, are to be taken into connection as together forming one transaction, and their effect seems to be that Kline & Son having effected what was supposed to be an insurance on the wheat in store at the mill, for the benefit of the plaintiff, the Klines afterwards sold, and the plaintiff bought, 5000 bushels of wheat, at 2s. 9d. a bushel, which wheat had been received in store at the Klineburg mill store-house, and was then held subject to the order of the plaintiff, to be shipped by the first conveyance, in flour or wheat, for sale in New York or Toronto, the last expression having an obvious meaning originally, but becoming useless or superseded by the sale ultimately made. I think that until the sale was agreed upon, all was *in fieri*—one party negotiating for money, and the other party willing to accommodate him, but adopting precautions for his security; and that when the money was paid, as upon a sale, both the papers signed by Kline & Son were left with the plaintiff's agent, together constituting the evidence of the sale by Kline & Son. I do not see that the Statute of Frauds interposes any difficulty, for there is both a writing sufficient to charge the vendors, and there was a part payment of a very large part of the price agreed upon. It is possible it was meant as a security in the end, but it was on the face of it a transaction of absolute sale; I do not perceive therefore any particular reason for the bought and sold notes of the 18th of October, to corroborate or confirm a sale previously inchoate, for it seems to me to add nothing thereto for the plaintiff's advantage; they merely report the sale and purchase of 5000 bushels of wheat, in store at Klineburg, at 2s. 9d. per bushel, subject to the order of the plaintiff's agent, Goodenough, terms cash. The sale on the 14th of October was of a like quantity, at the same place, and for the same price, whether subject to the plaintiff's agent or of the plaintiff himself could make no difference, and the other agreement of the 14th of October, provided for the terms on which the wheat was to be ground and sent to Toronto; the terms cash, expressed in the bought and sold notes were implied in the sale and purchase of the

14th—that is, cash on delivery, for no terms as to credit seem to have been made, probably under the impression that to the extent of the plaintiff's advance, he was entitled to delivery; and the first document, signed by Kline & Son on the 14th of October, contemplated a prompt delivery of the wheat or flour: the second one, however—namely, the receipt for £500, on account of 5000 bushels of wheat sold, (which at 2s. 9d., would amount to £687 10s.), says nothing of the delivery; and, left to inference, the inference of law is, that it was to be delivered as soon as paid for, with a lien thereon by the vendor till the price was paid. If there was more wheat in the mill (whichever be adopted as the day of sale) than 5000 bushels, the cases seem to show that nothing equivalent to a delivery took place, and that until separated from the rest, all had not been done by the vendors to render it ready for delivery, wherefore it remained at his risk, and the property did not vest in the plaintiff; but if the whole quantity on hand was less than 5000 bushels, in which event the warehouse receipt would have exaggerated the true quantity in store, and as the vendee was entitled to 5000 bushels, he would be entitled to all there, and if nothing more was required to be done, it would vest in him if he was willing to accept less than the whole number of bushels contracted for; but, in this event, it would remain to be weighed, to ascertain the quantity preparatory to its delivery, and in order to ascertain the amount to be paid for it. Irrespective therefore of the question of payment in full, it is by no means clear that the property had passed before the 31st of October, leaving nothing to be done but payment of the balance to entitle the plaintiff to delivery, and it was not in fact delivered; I attach no weight to the delivery on the 5th of November, for if not the plaintiff's before that date, the right of property and possession constructive if not actual, or both, had been transferred to the defendants by assignment. Beyond this, is the ulterior question, mainly relied upon at the trial, whether in point of fact any of the wheat or flour in the mill or store on the 14th of October, and if any, how much, ever came to the defendant's possession. Some of the cases cited, are strong to

shew that trover will not lie unless the specific wheat and flour owned by the plaintiff can be proved to have been converted by the defendants; and on this point the evidence leaves it in great uncertainty. 5000 bushels of wheat, at $4\frac{5}{8}$ bushels to a barrel, would render 1132 barrels. On the 5th November, the flour, 348 barrels, and wheat, 1500 bushels, as stated by plaintiff's agent, would amount to 688 bbls.

The miller stated in his evidence, that on the 14th of October, there was not much exceeding 2000 bushels of wheat at the mill; he does not speak of any flour: that between the 18th of October and 4th of November, 2925 bushels were received, sufficient to make 672 barrels of flour (quære 663): that between the 18th of October and 4th of November, he delivered out in all, 515 barrels of flour, which would require 2312 bushels of wheat (quære 2291), equal to the quantity in the mill on the 18th of October; wherefore, as the defendants had received only 672 barrels, it followed that the flour made of the wheat in the store on the 14th or 18th of October, must have been otherwise, and previously disposed of, and it would seem to be so, if the miller's statements are to be adopted as perfectly true, and there was no other flour delivered out after the 18th of October, except such as was made of wheat then in the mill unground or subsequently received. He stated, however, that in addition to what was on hand on the 14th of October, and afterwards received up to the 4th of November, 5237 bushels were received, from which deducting 188 bushels received between the 1st and 4th, that is, between the date of the assignment to defendants, and their taking possession, it would leave 5049 bushels received up to the 31st of October inclusive. The jury perceiving this, may have deemed the plaintiff justly entitled to a moiety thereof, and found for him accordingly, or they may have discredited, or not been satisfied with the representations made by the miller as to the quantity in hand on the 14th or 18th of October, or since received, and been rather led to the conclusion that the 672 barrels of flour received by defendants did include a large portion of the wheat in the mill when the plaintiff made the purchase of 5000 bushels, and

so it would if, as represented by Kline, there really were 5000 bushels or more in store on the 14th of October; for the miller only accounts for 515 barrels, exclusive of what the defendants received; in other words, for 2300 bushels of wheat, not one half of the alleged quantity. Of course the miller's statement as a witness, or Kline's as vendor, must be incorrect; the one is inconsistent with the other; and if there were 5000 bushels on the 14th of October, and the quantity afterwards received which the miller represents, he of course, does not account for all of it. Allusion was made to some criminal trial, in which evidence was given, supporting Kline's warehouse receipt, but what witnesses were examined or what they said, we know not. Kline was not examined on the trial of this cause. It has been contended that the transactions of the 14th of October, did not transfer any right to the plaintiff in any specific wheat for want of identity, but not that the bought and sold notes had not that effect, if duly authorized, or afterwards confirmed by acquiescence; nor has it been contended that if the right of property passed, the plaintiff was not entitled to possession by reason of non-payment or tender of the price in full; but the defence was mainly rested on that which went more to the merits—namely, the fact that no wheat or flour that could have passed to, or been vested in, the plaintiff was ever received or converted by the defendants. As respects the delivery on the 5th of November, I do not attach importance to it, for if the plaintiff had not previously acquired the right of property and right of possession sufficient to enable him to maintain trover against the defendants, as having accepted an assignment thereof and taken possession of it, as they say they had by their agent on the previous day, the defendants had thereby acquired the better right, and the plaintiff's previous inchoate title could not be perfected by such post delivery under the circumstances. The jury, so far as facts and conclusions from the facts in evidence could go, decided in favour of the plaintiff's right. It is however a case of some nicety, both as respects the law and facts; it is a hard one upon the plaintiff; and if I could see clearly that the finding of the jury was supported in law

and evidence, I should not be disposed to disturb it merely on the ground of the weakness or conflicting nature of the testimony, because it is clear that the plaintiff paid £500 for wheat alleged to be forthcoming, and he ought in common honesty to have received it; but, upon the best consideration, I think it forms one of those cases which it is proper to submit to another jury. I think, therefore, the rule should be made absolute for a new trial; I think, however, that it should be upon the terms of payment of costs. No specific exception has been taken to the learned judge's charge, nor is it pointed out that any legal evidence offered was rejected, or that any evidence was improperly received; the whole case was left to the jury as depending upon their opinion of the facts, and I cannot say I think their verdict can be considered perverse, because they found for the plaintiff, without having been instructed or advised to find for the defendants: it was left to them to exercise their judgment on points depending upon the veracity of witnesses and the estimation of the jury of the whole evidence; they found what I suppose they felt the justice of the case called for, although the evidence may have preponderated in favour of defendants on the fact of the identity of the wheat or flour claimed by the plaintiff and converted by the defendants. I do not overlook the question of law which arises touching the right of property and possession, to sustain trover, adopting the transactions of the 14th and 18th of October, both or either, as constituting a valid contract of sale, but I do not find that any point raised at the trial was incorrectly disposed of by the learned judge; and, therefore, although the plaintiff's right to recover is doubtful in law as well as in fact, I do not think that having been left to the jury as it was, without the objections of law to which I allude having been raised, it presents a case for a new trial, except on the terms mentioned.

McLEAN, J.—The plaintiff's right to any wheat was rested upon the validity of the arrangement made by his agent Goodenough on the 18th of October, all previous dealings or bargains appear to have been considered as superseded by the proceedings which Goodenough swears

took place on that day. If recognized, as appears to be the case, by plaintiff and Kline, as the broker acting for the latter in the sale, and for the former in the purchase of the wheat, the bought and sold notes of the 18th of October, would be good as to any wheat then in the mill. Though he had been out on the 16th of October, at the mills of Kline & Co., no delivery of any wheat was taken, and none is shewn to have been taken until the 5th of November, the day after the defendants by their agent Gun, had taken possession of the mill and its contents. On the 5th of November, a certain quantity of flour was marked for plaintiff, and thus possession was taken for him; but unless that flour was the produce of the wheat in the mill on the 18th of October, the plaintiff could have no right to claim it under the sale then alleged to have been made; all his interest would arise from the delivery of it to him; but that delivery, unless made by some one having a right, could not confer any property. If then the defendants, before such delivery, had taken possession under the assignment, they could not be deprived of their right by any unauthorized act of other persons, and so the delivery to plaintiff's agent would be useless. Then, again, it is not shewn that there were 5000 bushels of wheat in the mill on the 18th of October, but the contrary is shewn by the evidence of the miller, who produced the mill books, and established that in fact there was at that time only about 2312 bushels of wheat in the mill, and that the 515 barrels of flour which were sent to Browne's and to Maitland's wharves, and delivered to other persons, were manufactured from that wheat. If this evidence is correct, and there is nothing to throw any doubt upon it, then I think it is evident that the verdict has been rendered for the flour marked in the plaintiff's name on the 5th of November, which was manufactured from wheat received into the mill after the 18th of October, and not included in the sale of the plaintiff.

It appears to me that the charge of the learned judge and the evidence given on the trial, ought to have led the jury to a different conclusion, and that there ought to be a new trial on payment of costs.

SULLIVAN, J., concurred.

Rule absolute.

YOUNG v. SLOAN.

Whether the words are actionable or not as understood by strangers.

The declaration sets out that the plaintiff carried on the business and trade of a weaver in, &c., and was, &c., and that before the speaking the words mentioned in the declaration, defendant had retained and employed plaintiff to weave thirty-five pounds of yarn for him, and that defendant had delivered such yarn to the plaintiff for that purpose; that upon the said yarn being wove, &c., it had been alleged by defendant that five pounds of the yarn was deficient, and had been feloniously stolen by the plaintiff. The declaration then, in the third count, alleged that the defendant in a certain other discourse of and concerning the yarn, and in the presence and hearing of divers persons, spoke and published the following words, that is to say: "Thomas Young (the plaintiff,) stole five pounds of my yarn; it was a roguish trick." And in the fourth count, the words are alleged to have been: "Thomas Young stole five pounds of my yarn."

Held, That the words spoken in the presence of strangers, ignorant of the particular circumstances relating to the yarn, were actionable.

Held, on motion in arrest of judgment on the ground that plaintiff being bailee, could not be guilty of larceny: that the use of words imputing indictable offence is actionable or not, according to the sense in which they may be fairly understood by bystanders not acquainted with the matter to which they relate.

The declaration begins with an inducement that before and at the time when, &c., plaintiff carried on the business or trade of a weaver, and was a person of good fame, &c., and that defendant had retained and employed him to weave certain yarn—to wit, thirty-five pounds—for said defendant, for reasonable reward, &c., and delivered such yarn to the plaintiff for that purpose; and that upon the said yarn being wove and weighed, it had been and was alleged by the defendant that part of his said yarn—to wit, five pounds—was deficient, and had been feloniously stolen by the plaintiff, the defendant maliciously contriving and intending to injure plaintiff, &c., (not adding, and to have it suspected and believed that he had stolen defendant's yarn.) Then follow the first and second counts, not material to be here stated—the verdict on these counts being for the defendant. In the third count, the plaintiff further said the defendant afterwards—to wit, on, &c., in a certain other discourse which he then had in the presence and hearing of divers persons of and concerning the plaintiff, and of and concerning the said yarn, (not saying of and concerning his trade as a weaver), defendant further contriving and *intending as aforesaid*, falsely and maliciously spoke and published, of and concerning the said plaintiff, and of and concerning the said yarn, the false and malicious words following: *i. e.*, "Thomas Young (meaning the plaintiff,) stole five

pounds of my (defendant's) yarn ; it (meaning the said stealing) was a regular roguish trick." In the fourth count plaintiff further said, as in third count, to the words, and then states the words to have been, " Thomas Young (plaintiff) stole five pounds of my (defendant's) yarn ;" by means whereof plaintiff was greatly injured, &c.

Plea, not guilty.

Verdict for plaintiff as to third and fourth counts, and £5 damages.

The case was tried before the Chief Justice of the Court of Common Pleas, at the last assizes held in and for the United Counties of Frontenac, Lennox, and Addington, when the speaking of the words as laid in the third and fourth counts was proved by several witnesses ; but all the witnesses, except one, understood them to be spoken in reference to the state of facts set out in the inducement—in other words, to charge the plaintiff with having embezzled or fraudulently withheld a portion of a quantity of yarn which defendant had placed in his possession as a weaver to be made into cloth. It was so far therefore the case of a bailor charging his bailee with theft. One witness, however, stated that he heard the defendant, speaking of plaintiff, accuse him of having stolen five pounds of yarn, in the hearing of several persons, without explaining and without the witness knowing to what particular yarn he alluded, or that he alluded to any transaction of bailment as aforesaid. For the defendant it was objected that the words did not import larceny, and that a bailee could not be guilty of larceny. It was, however, left to the jury, although a bailor charging a bailee with larceny, meaning to impute embezzlement or fraud, might not be actionable in the form of this declaration, because a bailor had no right to charge his bailee in terms imputing a larceny, and so himself intending to charge him in ignorance of the legal character of the supposed facts, on which (if true) such charge was founded. It appeared the defendant meant, and the auditors understood him to mean, that the plaintiff had stolen five pounds of his yarn, by fraudulently abstracting and withholding it ; and the learned judge was not prepared to say it was an answer to the pre-

sent action, that the conduct imputed under the supposed facts was not larceny in point of law, though so termed by the defendant in allusion thereto. The defendant appeared to have first regarded the legal character of the conduct he imputed to the plaintiff to be larceny, called it stealing in the hearing of others, and now contends that although he meant such charge, the supposed facts on which it was based, did not, if true, amount to such an offence, and that the bystanders knew to what supposed state of facts he referred. The learned judge was disposed to think that a charge of theft or stealing, deliberately made in reference to a state of facts amounting clearly to dishonesty, though positively not in law constituting larceny, the defendant's meaning in his own mind to charge the plaintiff with that crime as his construction of his conduct, was actionable. The jury found for the plaintiff; in reference to the inducement they found the third and fourth counts of the declaration as proved, and the verdict was entered for the defendant on the first and second counts, at the request of the plaintiff's counsel.

In the early part of last term *Helliwell* obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a new trial be granted, as being contrary to law and evidence, and for misdirection, or to arrest judgment on the third and fourth counts.

Vankoughnet, Q. C., shewed cause during the same term; and, as to the last part of the rule, contended that on the face of the record, there is nothing to show that the charge so alleged was not a larceny but a mere breach of trust, and that those who heard the words as laid would naturally understand that a charge of larceny was intended. *Heming v. Power*, 10 M. & W. 546; *Park, B.*, said, "The reason why the action lies is, that those persons who heard the slander, might infer that the plaintiff had been guilty of a felony, and might make a charge founded upon it; but if at the time the words are uttered, there are circumstances which clearly show the words are not used in a sense imputing a felony, then the charge falls to the ground, and no action will lie."—*Read v. Ambridge*, 6 C. & P. 308;

2 Mood. & Rob. 119; Hawkinson v. Bilby, 16 M. & W. 442; 4 Ju. 684. That the evidence supports the action whether treated as a positive unqualified charge of larceny or in reference to the inducement, and as amounting only to embezzlement or fraud.—Stat. 4 & 5 Vic. ch. 25, sec. 41; Daines v. Hartley, 3 Ex. R. 200.

Gildersleeve, in replying, submitted that what the hearers understood, is immaterial on the application to arrest judgment, as it depends upon the pleadings; and the inducement shewed the plaintiff could not steal the yarn, being bailee of it.—4 Tyr. 90; as the words are not alleged to have been spoken in reference to the plaintiff's trade.—2 Scott, 590; 2 Ch. R. 657; Thomas v. Jackson, 3 Bing. 104; Hawkinson v. Bilby, 2 C. & K. 440; that there should be a new trial, the words as proved not imputing larceny in point of law, and malice not inferable therefrom, nor was it proved or left to the jury as a fact in issue.—Holt v. Scholefield, 6 T. R. 691; Smith v. Carey, 3 Camp. 461; Thompson v. Bernard, 1 Camp. 48; Peak 4; 2 N. R. 335; 2 Ch. R. 657; that it was misdirection, not leaving it to the jury to find for defendant, if the hearers understood the words to allude to yarn delivered by the plaintiff to the defendant as bailee, to weave, &c.—Tempest v. Chambers, 1 Star. N. & C. 67; Hawkinson v. Bilby, 16 M. & W. 442; Davies v. Hartley, 2 Ex. R. 200.

MACAULAY, C. J.—I think this rule should be discharged. First, as to setting aside the verdict; There was evidence of the words laid as having been spoken by the defendant, both in relation to the yarn mentioned in the inducement to the declaration, and so understood by the hearers; and also generally by those who did not know they related to any particular yarn or transaction, though they did know the plaintiff was by trade a weaver; and it was left to the jury to find for the plaintiff, if satisfied that the defendant, in reference to the yarn mentioned in the inducement, spoke the words, intending thereby to impute to the plaintiff the crime of stealing such yarn, and they so found. They found the two counts as laid and traversed; and in effect, under my direction, also found not merely that the defendant spoke

the words without intending to charge a larceny, but that he did so intend: at all events, they clearly found that he used words in reference to the inducement and maliciously. It was not left to them as a question of express malice, but as resulting in law from the charges made, if proved as laid, and that whether regarded as a charge of stealing, or only the imputation of embezzlement, or of dishonesty in the way of plaintiff's trade.—*Heming v. Power*, 10 M. & W. 564; *Read v. Ambridge*, 6 C. & P. 308; *Smith v. Carey*, 3 Cam. 461; *Peak*, 4; *Hawkinson v. Bilby*, 2 C. & K. 440; *Daines v. Hartley*, 8 Ex. 200; *Hawkinson v. Bilby*, 16 M. & W. 442; *Bromage v. Prosser*, 4 B. & C. 247; *Foster v. Pointer*, 8 M. & W. 806. In any of these events, malice is inferred by law, and express malice need not be proved. *Dorley v. Roberts*, 3 Bing. N. S. 835, is against this part of the rule.—*Bamfield v. Massey*, 1 Camp. 461. I find it laid down in *Roll. Ab.* 73, p. 16, and in *Vin. Ab.* 503—if a man says to a miller that keeps a mill, thou hast stolen eight pecks of meal, an action lies; for, though the corn was delivered to him to grind, yet, if he steals the meal, this is felony, being taken from the residue.—(See *ib.* p. 470; *Pl. a* 4); 1 *Roll. Ab.* 73, *Pl.* 16; *Cro. El.* 279, *Pl.* 7; *Cro. Jac.* 600; *East P. C.* 698; *Kel.* 35. A silk throster had men come to work in his own house and delivered silk to one of them to work, and the workman stole away part of it; it was agreed by *Hyde, C. J.*, that this was felony, notwithstanding the delivery of it to the party, for it was delivered to him only to work, and so the entire property remained there only for the owner; like the case of a butler who hath plate delivered to him, or a shepherd who has sheep delivered to him, and they steal any of them, that is felony at the common law. *Russell on Crimes*, 1092; *Regina v. Harris*, 5 *Cox's Crim. Cases*, 151; *Regina v. Poyser*, 15 *Ju.* 386; 2 *Russell on Crimes*, 128.

Second, as to the arrest of judgment. It was incumbent on the plaintiff to prove the words as laid, and that they were spoken in reference to the yarn. Now, if we could see that words so spoken could not under any possible state of facts be actionable, as not casting on the plaintiff any objectionable imputation, either in relation to a criminal charge or

to his trade, the judgment should be arrested. But on whichever ground it be placed, it appears to me the plaintiff is entitled to judgment. If the words as laid, and in reference to the inducement, charge a criminal offence, whether it be larceny as after a determination of the bailment by tortious acts of the plaintiff, or embezzlement, and the action lies, and I think they do at least impute a charge of one kind or the other against the plaintiff as defendant's bailee of the yarn delivered to him for a special purpose. Stat. 1 Ann.; Stat. 2 Charles 18 S. 1; Stat 13 Geo. II. ch. 8; 7 Jac. sec. 2, respecting embezzlement, of bailees of yarn, &c., entrusted to them to weave, &c. But if not, and although the words are not alleged to have been spoken of plaintiff in relation to his trade. still his trade of a weaver, and that he had yarn of defendant's to weave as such, is stated in the inducement and admitted by the plea (if not, it was proved at the trial and so found by the jury); and it is found, so far as alleged that the words were spoken of the plaintiff and had reference to the yarn mentioned in the inducement; and I think the cases shew that such word so spoken, under such circumstances, do necessarily affect the plaintiff in his trade and are actionable on that account, without special damage being laid or proved, and though they do not charge any criminal or penal offence, punishable by law by fine or imprisonment; if so the judgment ought not to be arrested.—*Stanton v. Smith*, 2 Lord Ray. 1480; disapproved of in *Dorley v. Roberts*, 3 N. S.; but recognised afterwards in *Jones v. Littler*, 7 M. & W. 423; 2 Saund. 307 a. (1) d. *Lumley v. Allday*, 1 C. & J. 801; *Brayne v. Cooper*, 5 M. & W. 249; *Bryant v. Loxton*, 11 Moore 344; 4 Tyr. 90. *Freeman* reversed in error, 1 Vin. 227; 1 Vin. Ab. 465; action for words.—1 Lev. 380; Cro. Jac. 673; *Day v. Robinson*, 4 N. & M. 884.

These references show that if the act imputed to the plaintiff was not larceny or embezzlement, it is very doubtful even if they do not (by reason of their reference to the yarn entrusted to the plaintiff to weave) amount to a criminal charge in strictness of law. I cannot say that I am satisfied I was wrong in leaving the case to the jury as I did. The

defendant meant, and all who heard him understood him to mean to impute theft or stealing to the plaintiff, or at least embezzlement, and (unless they were familiar with the law and minutely acquainted with the facts, which shewed that though the expression *stealing* was—and yet the crime of larceny was not, or could not have been intended, because though here the misconduct would not be larceny, although so termed by the defendant), they might reasonably have supposed that the dishonesty alleged did constitute one of these offences. It is not a case in which the intention to accuse of larceny or embezzlement is repelled, because the words on the face of them do not impute such crime. They do impute larceny, unless explained away by reference to the peculiar circumstances in relation to which the defendant was known to be speaking. It is a nice question of law depending upon the exact state of the supposed facts alluded to, compared with adjudged cases; and I am not prepared to say that the evidence shews that the plaintiff could not have been guilty of larceny in the premises. The words no doubt impute a criminal offence, and as said by Parke, B., in *King v. Brown* (ante), “those who heard the slander might infer that the plaintiff had been guilty of a felony or some other criminal offence, and might have been induced to make a charge against him founded upon it.”

McLEAN, J.—The two counts allege the conversations of defendant to have been of and concerning the said yarn—that is to say, the yarn delivered by the defendant to the plaintiff, to be wove for certain reward; and the defendant is charged with having accused the plaintiff of having stolen a portion of that yarn. Some of the witnesses on the trial declared that they understood the defendant to charge the plaintiff with stealing yarn, without being aware what particular yarn the defendant referred to; and such an accusation, it appears to me, made in the presence of strangers ignorant of the particular circumstances relating to the yarn, would undoubtedly be defamatory and actionable. It was quite true that there could be no larceny of yarn by the plaintiff which was delivered to him to be made into cloth; but, though he may have received the yarn

for that purpose that fact could not protect the defendant from an action for stating in the presence of strangers, in general terms that the plaintiff had stolen his yarn, though the conversation may have been about the yarn delivered to be wove. I think there was sufficient evidence to support the verdict, and that, though the defendant's conversation is alleged to have been in reference to yarn delivered to be wove, a general accusation (not understood by the bystanders to refer to that yarn) that the plaintiff had stolen some of the defendant's yarn is clearly actionable. The statement in the last two counts contains an allegation that defendant charged plaintiff with stealing his yarn under particular circumstances, and appears to me to be sufficient, and to be supported by the evidence.

SULLIVAN, J.—I have not been able to take the same view of the law of slander as that entertained by the learned Chief Justice at the trial; and if the plaintiff's verdict depended upon the absolute correctness of the charge, I should have been in favor of making the rule for a new trial absolute.

The wrongful conversion of yarn entrusted to a weaver to make into cloth is not larceny *per se*, neither is it an act of embezzlement under the provincial act 4 & 5 Vic. ch. 25, or by any of the English acts from whence that statute has been derived, even when accompanied with a criminal intention. The act does not fall within the cases defined by these statutes. I think the statute 1 Anne, stat. 2, ch. 18, of very doubtful application. It was passed to provide a summary remedy against persons employed in the working up the woollen, linen, fustian, cotton, and iron manufactures of the kingdom, and in protection of the trade and commerce of the kingdom; and besides, the doubt which has always hung over the application of statutes passed in England, with a view to its trade, commerce, and manufactures, to acts done in the colonies, and especially in this province, where they have been sought to be applied by virtue of our adoption of the criminal law of England, I am not prepared in the absence of direct authority, to hold that the statute in question applies to cases where persons, in the

process of mere manufacture for their own use, entrust materials to weavers or other workman, the workmen are not employed, I think, in the sense of the statute, in the manufactures of the kingdom; and I feel certain that, in the case of a delivery of wool by a private person to be made up for his own use, or without a view to trade or commerce, the third section of the act would not in England be held to apply. By that section it is made penal to pay the workmen otherwise than by the current coin of the realm; and however proper this might have been in the case of manufacturers and traders employing workmen, I do not think it was intended for cases where workmen were employed to make up goods for private use; and I think, moreover, that this section is in itself sufficient to shew that this was not a part of the criminal law intended to have been adopted as part of the law of Upper Canada: I think it would fall within the same category as many of the statutes concerning trade, apprentices, manufacturers, farm-servants, &c., which have been held by our courts not to have been introduced into Upper Canada by the general provision.

But it is not a mere detention of the article delivered to be manufactured which is charged by the words of slander stated in this declaration. The *animus furandi* is clearly imputed by the words "he stole my yarn." And I should find it very difficult to adjudge that the separation of one part of the yarn, with felonious intent from the parcel delivered, would not be a larceny at common law. Every larceny is said to include a trespass, and it is difficult to conceive a positive act of trespass to be included in the retaining possession, with a fraudulent intent, of chattels previously in the possession of the person retaining them. Yet the cases cited in Hawk. P. C. cxix., notes 1, 2, 2nd Ed. 664, shew that in case of a finding, or of a fraudulent detention by a hackney coachman, of a parcel belonging to a passenger (the owner being known), the act has been adjudged a larceny; and the very cases of a *weaver* who received silk to work, or a miller who received corn to grind, are cited in sec. 4 of Serjeant Hawkins, chap. 19; and in

sec. 10, the case of a watchmaker, who stole a watch delivered to him to clean, and the case of one to whom clothes were delivered for the purpose of being washed, the taking away and conversion of these things have been adjudged felonies or larcenies at common law.—See also Russell on Crimes, 1092; 5 Cox's Crim. Cases, 591; 15 Ju. 286. *Regina v. Poyser* seems clear upon the subject. The last case was that of a man to whom clothes were delivered to sell, and he pawned one article; this was held to be larceny, the bailment being determined by the wrongful act of the prisoner. These cases, which probably, (as stated by the learned annotator to Hawkin's P. C.), go to the extreme point, are yet sufficient authority for a charge much more decidedly against the defendant than the one delivered; for if it were possible for a weaver to commit a larceny of part of the material committed to him to make up, by severing it from the remainder with a felonious intent, the words used in the present instance preclude all nicety of discussion, and attribute the felony directly.

Supposing that a felony by the weaver was impossible under the circumstances, then this would seem to me like a case in which the defendant would be charged with slander by saying of a plaintiff, "he stole my apples off my trees," or "he stole my window shutters off my house;" because although the words themselves do not contain any qualification which would shew a felony in fact not to be imputed, yet the declaration by its inducement would show the qualification of the meaning of the words—or if not, the point should in this view of the case, have been left to the jury, whether the witnesses understood the words to refer to circumstances which make larceny of the goods by the plaintiff impossible. *Jackson v. Adams*, 2 B. N. C. 402, is the case of slander of a church warden, charging him with stealing the parish bell ropes; and it was held not to lie, because a church warden could not be guilty of a larceny of the parish bell ropes.—See also *Williams v. Scott*, 1 C. M. & R. 675; *Tempest v. Chambers*, 1 Starkie, N. P. C. 67. In this latter case the words of slander were, "I have got a warrant for Tempest; I will advertize a reward to

apprehend him ; I shall transport him for felony :” these words were spoken to a person who understood they referred to a charge of taking window shutters off a house. Lord Ellenborough said, “ The defendant probably thought that, as he had claimed a warrant, the plaintiff had been guilty of felony :” this is different from words spoken to a stranger. In *Hankinson v. Bilby*, 16 M. & W. 442, Pollock, C. B., says, “ Words uttered must be construed in the sense in which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matters in question might form a different judgment.” In the present case, supposing a larceny by the defendant of the yarn not legally possible, most of the hearers of the slander, if not all, were in the situation of the particular individuals supposed by Chief Baron Pollock.—*Daine v. Hartley*, 3 Ex. 200 ; *Heming & wife v. Power*, 10 M. & W. 509 ; the judgment of Park, B. 1 C. & M. 675 ; the American case, *Becket v. Sterrett*, mentioned in the note to the American edition, 10 M. & W. 571.

If the decision of this rule depended upon the absolute correctness of the charge of the learned Chief Justice, I should be in favour of making this rule absolute, because I think that if the words of slander are spoken with a reference understood by the hearers to facts which will not admit the legal probability of a felony, the mistake in law of the speaker and hearers in supposing that the facts referred to did admit of the supposition of a felony in law would not make the words legally slanderous. I am however far from being convinced that there was any such mistake ; and, supposing that there were, I think the action clearly maintainable on another ground.

It was proved, and it is not denied but on the contrary it is here argued for the defendant, that the words spoken referred to and intended an alleged act of dishonesty of the plaintiff in the way of his trade as a weaver ; that trade is stated as inducement—the delivery of the yarn is also stated, and the words are said to be of and concerning the yarn ; a more injurious charge of dishonesty against the plaintiff in the way of his especial trade could scarcely have been

made, and the proof supports the statement in the declaration. Here then is a ground upon which not only the action might have been sustained, but according to undisputed facts, it must have been so.

It may perhaps be said that the jury gave their verdict for damages upon the understanding that they were at liberty to find the words imputed a felony, and not for an injury to the plaintiff in the way of his trade. But the jury were not told that the words imputed an act for which a prosecution for felony could have been instituted; and if it be even assumed that there was a good cause of action, it cannot be of consequence as to the assessment of the damages whether the substantial ground of the action was slander intended impute, but not imputing, a felony, and the position in life of the plaintiff, a consideration in the computation of the damages—or whether, on the other hand the slander of the plaintiff, in his trade was the legal ground of action, and the unmeasured terms in which the slander was expressed the matter of aggravation—the facts upon which the damages would be assessed would remain the same.

I think, therefore, that even if under the circumstances referred to, a felony were not imputed, if a colloquium of and concerning the plaintiff in the way of his trade be not in this instance necessary that the verdict should stand. This latter point has to be considered in the disposal of that part of the rule for arresting the judgment.

The cases collected in 2 Wm. Saund. N. 1; Sir T. Ray. 75; 6 Mod. 202; 2 Salk. 696 S. C.; 2 Stra. 1169; 2 H. B. 531, and many others would appear to lay it down as a rule that when words are not actionable in themselves, but are only so because they are spoken of a plaintiff in his profession, office, or trade, they must be so alleged in the declaration, otherwise judgment will be arrested. But it appears to me that there are exceptions to this rule, and that when the profession, office, or trade, is averred by way of inducement, and the words are such as necessarily and particularly must affect a person holding or exercising the profession, office, or trade, a colloquium of, and concerning

the plaintiff therein is not necessary, of this class of cases.— See *Carn v. Osgood*. 1 Lev. 280. To say of a justice of the peace, he is forsworn and not fit to sit upon the bench, was held actionable without any colloquium of office; for it appears from the words themselves that they were spoken of him in relation to his office.—*Staunton v. Smith*, 2 Lord Raym. 1480. *Jones v. Littler*, 7 M. & W. 423, was the case of a brewer, of whom it was said, he has been in a sponging house, held good without a colloquium, or even if spoken of plaintiff in his private character, for the words must affect him in the way of his trade. This case is directly in point.—*Whittough v. Gladwyn*, 5 B. & C. 180. See also *Marter v. Digby*, 2 U. C. Q. B. R. 441, where a question like this is very fully discussed. The present case is as clearly within the exception to the rule which requires a colloquium as it can be. The plaintiff is alleged to be a weaver; that the defendant delivered him yarn to weave; that, speaking of this yarn, the defendant said he stole five pounds of my yarn. This surely is a colloquium of the plaintiff in his trade; and I think the declaration not impeachable on that ground, upon any modern authority. In my opinion, that part of the rule for arresting the judgment, as well as the part for a new trial should be discharged.

Rule discharged.

KEISE V. MILLER.

Joinder of Counts.

First count states that plaintiff, at the request of the defendant had agreed to buy two certain parcels of walnut lumber then being in defendant's yard, in all 5000 feet, at 6*l.* 5*s.* per 1000 feet, to be paid for before delivery; then avers payment and delivery by defendant to plaintiff of a much less quantity, to wit, 3500 feet less than the contents of the said two parcels as defendant well knew, and that defendant fraudulently and falsely deceived and defrauded the plaintiff, wherebv, c. Second count states that plaintiff, at the request of defendant had bargained for two other certain parcels of walnut lumber then being in defendant's yard, containing 5000 feet of a certain quality, to wit, good merchantable lumber, at 6*l.* 5*s.* per thousand feet, to be paid for before delivery; then avers payment and delivery by defendant of 5000 feet as and for the lumber so bargained for, yet that the lumber so delivered by the defendant as last aforesaid, was inferior in quality to the lumber so agreed to be bought and was inferior in quality to the lumber so bargained for by a large sum of money, to wit, the sum of 5*l.* per 1000 feet all of which the defendant knew, and that defendant deceived and defrauded plaintiff whereby, &c. *Held per Cur.*, that there is no misjoinder of counts.

Writ issued 7th November, 1851. Declaration 13th November, 1851. First count states that before the committing of the grievances by the defendant thereafter mentioned, to wit, on, &c., the plaintiff at the request of defendant bargained for and agreed to buy of said defendant, and defendant agreed to sell to plaintiff two certain parcels of walnut lumber, containing in all 5000 feet then in defendant's yard, at the rate of 6*l.* 5*s.* per thousand feet of said parcels, being part of the price of said parcels, to wit, the sum of 14*l.* 15*s.*, to be paid by plaintiff to defendant before delivery of said lumber, and then avers that plaintiff paid to defendant the said sum of 14*l.* 15*s.*, yet that defendant afterwards, to wit, on, &c., fraudulently and deceitfully intending to defraud and deceive the plaintiff, did deliver a certain quantity of walnut lumber, as and for the said parcels of walnut lumber so sold to plaintiff as aforesaid, whereas in truth and in fact the said lumber so delivered by defendant to plaintiff as aforesaid, at the time of delivery thereof as aforesaid, was not the full quantity which the said parcels contained, and which defendant ought to have delivered to plaintiff, and wanted of the full quantity which said parcels contained a large quantity, to wit, 3500 feet, as defendant well knew, and that defendant fraudulently and falsely deceived and defrauded the plaintiff in said sale, whereby plaintiff lost and was deprived of the benefit and advantage which he would otherwise have derived from the said sale, and is greatly damnified, &c.

Second count states that afterwards, to wit, on the day and year aforesaid the plaintiff, at the request of defendant bargained with the defendant to buy two certain other large parcels of walnut lumber then lying in defendant's yard, containing in all 5000 feet, and of a certain quality, to wit, good merchantable lumber at 6*l.* 5*s.* per thousand feet, a certain portion of the purchase money of the said last mentioned parcels, to wit the sum of 14*l.* 15*s.* to be paid by plaintiff to defendant before delivery: then avers payment of the said sum of 14*l.* 15*s.*, and that defendant delivered to plaintiff a large quantity, to wit, 5000 feet of walnut lumber as and for the lumber so bargained for as in this count mentioned: whereas the last mentioned lumber delivered by the defen-

dant to the plaintiff was inferior in quality to the parcels so agreed to be bought by the plaintiff as last aforesaid, and inferior in value to the lumber so bargained for by a large sum of money, to wit, the sum of five pounds for each and every thousand feet of the lumber so delivered by the defendant as last aforesaid, all of which the defendant then well knew and the defendant thereby falsely and fraudulently deceived and defrauded the plaintiff and he hath been and is by means of the said last mentioned premises greatly injured and damnified to his damage, &c.

Demurrer to declaration, assigning for cause that there is a misjoinder of form of action in said declaration, in this, that the first count thereof is framed and is intended to support an action on the case while the second count is framed, and is intended to support an action on the case upon promises—the first count being framed in tort and the second in assumpsit.

Richards, in support of the demurrer, contended that the counts were manifestly inconsistent, and cited *Boorman v. Brown*, 3 Q. B. 510.

M. C. Cameron, contra, admitted the first count to be framed in case for a deceit, and contended that the second count for delivering inferior lumber was also in case, and both counts alike founded on the contract.—*Lancaster Canal Co. v. Harnaby*: that the declaration might be framed either in case or assumpsit; and if the first count is in case so is the second, both being for tortious breaches of contract, viz: deceit and misfeazance.—*Corbett v. Packington*, 6 B. & C. 268; *Courtenay v. Earle*, 15 Ju. 15, 20 L. J. C. P. S. C.

MACAULAY, C.J.—On reference to *Corbett v. Packington*, 6 B. & C. 268; *Burnet v. Lynch*, 5 B. & C. 589; *Boorman v. Brown*, 3 Q. B. 511, explained by *Courtenay v. Earle*; 15 Ju. 15 S. C. 20 L. J. C. P. S. C., it seems the correct inference that both these counts are founded upon contract and are counts in assumpsit for breaches thereof, and not in tort; they are ambiguously worded, but the breaches assigned in both are breaches of the contract of sale stated therein; the one alleging the delivery of less than the quantity purchased, accompanied with false representations, and

the other alleging the delivery of lumber of an inferior quality to that contracted for.

If one is in assumpsit so are both; if one is in tort, (case), so are both. I perceive no substantial difference; so that either way the demurrer fails.

The last case (15 Jurist, 15,) seems to decide that for mere breach of contract between ordinary individuals not involving any special breach of duty in the party infringing the agreement assumpsit, and not case, is the proper remedy.

MCLEAN, J.—The plaintiff in the two counts of his declaration in this case complains that the defendant deceived and defrauded him in reference to certain walnut lumber, and he alleges that he has sustained damage by reason of the deceit and fraud practised upon him in the delivery of a smaller quantity of other lumber and of inferior quality, and not merely of the breach of the contract for the sale and delivery of particular lumber. The two counts appear to be in tort, and there is no doubt that case or assumpsit would lie for the cause of action contained in the declaration. If the defendant contracted to deliver particular lumber, but delivered other lumber instead of that sold, assumpsit would lie for the breach of contract, or case for a deceit in substituting other lumber in place of that actually sold.

In the case of Boorman v. Brown, 3 Q. B. 525, in the Exchequer Chamber, Ch. J. Tindal, in delivering the judgment of the court, enumerated many cases in which a plaintiff may sue in assumpsit or case; and I think the plaintiff in this case was entitled to choose his own form of action, and that he has done so without any discrepancy between the counts of his declaration.

SULLIVAN, J., concurred.

Judgment against the demurrer.

PHILLIPS V. MERRITT.

Breach of contract—Special assumpsit—Assignment of Breaches.

In special assumpsit for not accepting a schooner, the declaration set out that in consideration that the plaintiff would sell to the defendant the schooner in question, "*together with all and singular the apparel, tackle and furniture, boats, oars and appurtenances to the said schooner belonging or appertaining,* and convey and assure the same to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances," for a stated price,

the defendant promised, &c. The declaration then alleged a delivery of the schooner to the defendant under the contract, "*together with the apparel, tackle, furniture and appurtenances thereto belonging, and the said boats and oars,*" and averred that, at the proper times "*the said schooner or vessel* was free from all incumbrances," and that the plaintiff was, at all such times, "ready and willing to make and execute a conveyance or bill of sale of *the said schooner or vessel with the said appurtenances, boats, and oars,* and to do every thing on his part to be done or performed by the said contract," and did—to wit,—&c., "tender to the defendant a conveyance or bill of sale of *the said vessel, with the appurtenances, boats, and oars,* in manner and according to the terms aforesaid." Breach that the defendant refused, &c. Upon special demurrer it was held that the declaration was bad for not alleging that the conveyance tendered embraced the "*apparel tackle, and furniture,*" and because it was not inconsistent with all the averments that the "*apparel, tackle, and furniture*" were not free from incumbrance.

The declaration states that on the 22nd August, 1850, the plaintiff, in consideration that the defendant would sell him a certain schooner or vessel, called "The William Henry Boulton," together with all and singular the apparel, tackle and furniture, boats and oars and appurtenances to the said schooner or vessel belonging or appertaining, at and for the price or sum of 500*l.*, and would convey and assure the same to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances, save and except a certain mortgage thereof heretofore made by and between the said plaintiff and one James Mitchell, &c., he the defendant then promised the said plaintiff to accept the said schooner or vessel, and to pay him the price thereof or sum of 500*l.*, in manner following—that is to say, 165*l.*, 13*s.* 4*d.*, part thereof on the 22nd of February, 1851; the further sum, &c. And that it was further agreed by and between the said parties that, in order to secure to the said plaintiff the payment of the said purchase money or price of the said vessel, the defendant should and would immediately, and within a reasonable time after the said sale and delivery to him by the plaintiff of the said vessel, make and execute unto the plaintiff a mortgage or conveyance of the same vessel, together with all and singular the furniture, tackle, rigging, boats, oars, and appurtenances—conditional upon the payment by the defendant to the plaintiff of the price thereof in manner aforesaid, and also, for further securing unto the plaintiff the payment of the said sum of money as aforesaid, that the defendant should and would immediately and within a reasonable time after the delivery to

him of the said vessel insure or cause to be insured the same vessel, &c., in some good, &c., marine insurance office for the sum of 300*l.*, and should and would within a reasonable time procure the policy of such insurance and assign the same to the said plaintiff, to be held, &c., and the defendant then—to wit, on the day and year aforesaid—further promised the plaintiff that for the better securing the payment of the said price of the said vessel, the said defendant should make and deliver to the said plaintiff three several negotiable promissory notes for the payment to the plaintiff of the said price of the said vessel in manner and at the times aforesaid, that is to say, &c.

And the plaintiff in fact saith that he confiding in the said promise of the said defendant did then—to wit, on the day and year first aforesaid—in pursuance of the said contract, and in part performance thereof, deliver the said schooner or vessel together with the apparel, tackle, furniture and appurtenances thereto belonging, and the said boats and oars, to the defendant on the terms and for the considerations aforesaid and the defendant then took, received, and accepted the same from the plaintiff. And the plaintiff further saith that the said vessel was then—to wit, on the day and year aforesaid—and from thence hitherto hath been and still is free from all incumbrances, save and except the mortgage aforesaid, made in favour of the said James Mitchell, of which the said defendant had notice. And although the plaintiff was then—to wit, on, &c.—and from thence hitherto hath been ready and willing to make and execute a conveyance or bill of sale of the said vessel, with the said appurtenances, boats and oars, and to do everything on his part to be done or performed by the said contract, and did on the same day and year first aforesaid, and on divers other days and times thereafter and before the commencement of this suit, and within a reasonable time in that behalf after the making of the said agreement, tender and offer to the said defendant a conveyance or bill of sale of the said vessel, with the appurtenances, boats, and oars, in manner and according to the terms aforesaid, yet the defendant did not nor would ever accept, or receive of or

from the said plaintiff such conveyance or bill of sale of the said schooner or vessel as aforesaid, or any conveyance whatever, but hath hitherto neglected and refused so to do. And that, although the plaintiff did afterwards, &c., and while the plaintiff was ready and willing and offered to give to the defendant a conveyance of the said vessel and her appurtenances, request the defendant to make and deliver to him the plaintiff a mortgage on the said vessel for securing the said sum of 500*l.*, in manner, &c., as aforesaid, and to make and give to the plaintiff the three several negotiable promissory notes aforesaid, in manner and according to the terms in the said declaration before mentioned, and did also request the defendant to insure the said vessel in manner aforesaid, and to assign the said policy to the plaintiff, and although the plaintiff at the time of his making, &c., was ready and willing to accept the said mortgage, promissory notes, and assignment of the said policy as aforesaid, whereof the defendant then had notice, and although the plaintiff did in a reasonable time in that behalf after the making of the said agreement, and while the plaintiff was ready and willing to convey as aforesaid—to wit, on, &c.—tender a mortgage on the said vessel, securing, &c., to the said defendant to execute, &c., yet the defendant not regarding his said promise, did not nor would when he was requested as aforesaid or at any time before or afterwards execute or deliver to him the plaintiff a mortgage on the said vessel for the said price or sum of money, according to the terms aforesaid, nor did he make or deliver to the said plaintiff three several negotiable promissory notes in manner and according to the terms aforesaid, nor hath he, the defendant, insured or caused to be insured the said vessel as aforesaid, neither hath he, the defendant, paid to the plaintiff the said sum of 500*l.*, or any part thereof, but he, the defendant, hath hitherto wholly neglected and refused so to do; by reason of which said several premises the said plaintiff hath not only lost and been deprived of the use and benefit of the said mortgage and of the said promissory notes, and of divers great gains and profits which he might and otherwise could have made thereof and thereout, but

hath lost and been deprived of his said vessel and of divers great gains and profits, which, &c.

2nd count: And that whereas also the defendant, to wit, &c., on, &c., was indebted to the plaintiff in 1000*l*. for the price of a schooner or vessel, together with, &c., and for work done &c., and for money paid, &c.

Demurrer to declaration. Special causes assigned—That it is not alleged in said count that plaintiff sold the said schooner therein mentioned, or the apparel, tackle, and furniture, boats, oars, and appurtenances, therein mentioned, although the sale of said schooner, apparel, tackle, furniture, boats, oars, and appurtenances, is alleged to have been the consideration for the defendant's promise to pay therefor: that it is not averred in said count that the plaintiff made or offered to make to the defendant a good and sufficient deed of conveyance or bill of sale of said schooner or vessel, free from all incumbrances except the said mortgage in said count mentioned in favor of James Mitchell, or a good and sufficient deed of conveyance or bill of sale of said schooner, apparel, tackle, furniture, boats, oars, and appurtenances, or that plaintiff was ready and willing to give such good and sufficient deed of conveyance or bill of sale of said schooner, apparel, tackle, furniture, boats, oars, and appurtenances: that it is not averred that the plaintiff ever assured in any manner, or offered to assure, or was ready and willing to assure in any manner absolutely or qualifiedly, to the defendant the said schooner or said tackle, furniture, apparel, boats, oars, or appurtenances to the defendant: that it is not stated when it was agreed that the defendant should secure the plaintiff for the price of said vessel by executing to the plaintiff a mortgage thereon, or that there was any consideration for said agreement, or what the consideration for such agreement was: that it is alleged that mortgage security was to be executed to the plaintiff after sale and delivery to the defendant of the said vessel, and no sale of said schooner to defendant is positively or otherwise averred: that it is not averred in said count that defendant promised to insure said vessel, although a breach for not insuring said vessel is alleged: that considera-

tion is alleged in said count for the defendant's promise therein alleged to make and deliver to the plaintiff the promissory notes therein mentioned: that it is not averred at what specific time the plaintiff tendered a deed of conveyance or bill of sale of said schooner to the defendant: that no tender of notes to defendant to be made by him is averred: that it is not alleged that the plaintiff has paid James Mitchell the amount of his mortgage on said schooner: that it is not averred at what time any sale of said schooner or tackle, furniture, apparel, or appurtenances was made to defendant, and that the said count is in other respects uncertain and insufficient.

Read, for the demurrer, contended that the plaintiff having undertaken to convey by a deed of conveyance or bill of sale, should have executed such a transfer and not merely alleged a tender which was no more than an offer to convey; and also, that such conveyance should have been alleged to have been free from all incumbrances: that the plaintiff should have paid off the mortgage to Mitchell without which the defendant was not bound to accept a transfer or to give negotiable promissory notes for the price; besides which there were material omissions of substantial portions of what was contracted for in the allegations of performance: that the conveyance offered is not alleged or shewn to be such as by law is required, in order to the due registering of the transfer; and that if entitled thereto the plaintiff should have tendered notes for signature.—Chy. Plg. 192; *Hart v. Meyers*, 7 U. C. Q. B. R. 417; *Prindle v. McCan*, 4 U. C. Q. B. R. 228; as to which see *De Medina v. Norman*, 9 M. & W. 820; *Maddeck v. Stock*, 4 U. C. Q. B. R. 118; *Kay v. Gamble*, 6 U. C. Q. B. R. 267; *Cro. Jas.* 503; *Cro. El.* 913; *Ferry v. Williams*, 8 Taunt 62; *Chanter v. Leese*, 5 M. & W. 698. That the condition was entire; and delivery of the vessel does not of itself entitle the plaintiff to sue for the price or the securities, that could not or were not to be given till the vessel was transferred.

Dempsey, for plaintiff, called attention to the cause of demurrer, and objected to any other points being now raised on the argument, and concluded that the agreement was

executory and conditional, the conditions and covenants mutual, and the plaintiff not bound to do more than tender on his part, unless the defendant was ready to perform on his: that freedom from incumbrances was expressly alleged: that the plaintiff tendered sufficiently, and was not bound to do more in the face of the defendant's refusal.—*De Medina v. Norman*, 9 M. & W. 820; *Laird v. Pim*, 7 M. & W. 474; *Humble v. Langston*, 7 M. & W. 517. That none of the causes of demurrer are valid objections to the declaration.

MACAULAY, C. J.—The first cause of demurrer involves the sufficiency of the performance by the plaintiff on his part of what constituted a condition precedent—namely, the sale of the vessel.

The declaration states the inducement or consideration of defendant's promise to have been that the plaintiff would sell to him the schooner in question, together with all and singular the apparel, tackle, and furniture, boat, oars, and appurtenances, to the said schooner belonging or appertaining, and convey and assure the same to the defendant, by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances, except a certain mortgage thereof to James Mitchell, upon which was due about 60*l.*, which the plaintiff was to pay, or the amount due on the said mortgage was to be deducted from the price of the vessel, if the defendant was obliged to pay the same, &c. The allegation of performance by the plaintiff is, that the said schooner or vessel was then, and from thence hitherto, free from all incumbrances, except the aforesaid mortgage; and although the plaintiff then was, and thence hitherto hath been ready and willing to make and execute a conveyance or bill of sale of the said schooner or vessel, with the said appurtenances, boat, and oars, and to do everything on his part to be done or performed by the said contract, and did on the same day and year first aforesaid, and on divers other days and time, &c., thereafter, and before suit, and within a reasonable time, &c., tender and offer to defendant, a conveyance or bill of sale of the said schooner or vessel, with the appurtenances, boats and oars,

in manner and according to the terms aforesaid, yet defendant did not nor would accept or receive such conveyance or bill of sale of the said vessel as aforesaid, or any conveyance whatever; but hath hitherto neglected and refused so to do. It is not contended the conveyance was not sufficient. The question is, whether it was done or sufficiently tendered to be done.—1 Saund. 320 note, (4); Morton v. Lamb, 7 T. R. 129; Glazebrook v. Woodrow, 8 T. R. 366; Goodisson v. Munn, 4 T. R. 761; Merrit v. Rane, 1 Stra. 458; Lancashire v. Killingworth, 1 Ld. Raymond, 686; Ferry v. Williams, 8 Taunt. 62; 1 Mod. 498 S. C.; McArthur v. Winslow, 6 U. C. Q. B. R. 144; Mattock v. Kinglake, 10 A. & E. 50; Wilkes v. Smith, 10 M. & W. 355; Playfair v. Musgrove, 14 M. & W. 244; Dicker v. Jackson, 12 Ju. 541; 6 C. B. 103 S. C.; Prindle v. McCan, 4 U. C. Q. B. R. 228; Price v. Williams, 1 M. & W. 6; Dixon v. Fletcher, 3 M. & W. 146; De Medina v. Norman, 9 M. & W. 820; Hannuic v. Goldner, 11 M. & W. 849; Granger v. Dacre, 12 M. & W. 431; Phillips v. Morrison, 12 M. & W. 140; Henderson v. Nicholls, 5 U. C. Q. B. R. 398; P. Stat. 8 Vic. ch. 5, 513.

On reference to the cases cited, I am not disposed to think the first cause of demurrer valid. The plaintiff alleges a delivery of the vessel, that she was free from all incumbrances, and that he tendered and offered a conveyance or bill of sale thereof to the defendant, which he refused to accept; he could do no more: at all events, the cases, I think, shew that what he did was so far sufficient; the tender as alleged imports the tender of an executed bill of sale, if material; it is not that he tendered or offered to execute a bill of sale; but that he tendered a conveyance or bill of sale.—Jones v. Berkley, Doug. 684; Laird v. Pim, 7 M. & W. 474; Humble v. Langston, Ib. 517.

I think, however, that the declaration is objectionable on the second ground. It is not alleged that the plaintiff tendered or offered a deed of conveyance, but a conveyance or bill of sale. The averment is in the alternative; and a bill of sale in writing, although not under seal, conforming with the provisions of the P. S. 8 Vic. ch. 5, S. 13, would

be sufficient to pass the property—Hunter v. Parker, 7 M. & W. 322; and the tender or offer of a bill of sale is alleged, I lay no stress therefore on this. But it is not alleged that the bill of sale tendered was of the vessel free from all incumbrances, or that it embraced all and singular the *apparel, tackle, and furniture* to the said vessel belonging, but merely the said schooner or vessel, with the appurtenances, boat, and oars, in manner and according to the terms aforesaid; and although it is alleged in the previous part of the declaration that the said schooner or vessel was free from all incumbrances, except the mortgage, &c., it does not state that all and singular the apparel, tackle, furniture, boat, and oars, were so free from all incumbrances, and they might have been separately mortgaged, or otherwise subject to some lien or pledge; although, as alleged, the said schooner or vessel, with the apparel, tackle, furniture, and appurtenances, and the said boat and oars, had been delivered to the defendant, and he had accepted and received the same. If it was after verdict or upon general demurrer, it is probable that the allegation of a tender of a bill of sale of the vessel, with the appurtenances, boat, and oars, in manner and according to the terms aforesaid, would, by force of the comprehensive term, appurtenances, (Gale v. Laurie, 5 B. & C. 156) and the concluding reference, be held sufficient to include the apparel, tackle, and furniture, although not expressed; so also the allegation that the vessel was, when delivered to the defendant, free from all incumbrances ought perhaps to be construed to embrace the apparel, tackle, furniture, appurtenances, boat, and oars (De Medina v. Norman, 9 M. & W. 820); but this is a special demurrer, and the omissions are pointed out as exceptions in point of form, and there does appear to be a frequent shifting of terms throughout the declaration.

The plaintiff undertook to sell the vessel with all and singular the apparel, tackle, furniture, boat, oars, and appurtenances to her belonging or appertaining, by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances except the mortgage to Mitchell; and, instead of adhering to these terms, the declaration constantly

deviates ; it alleges that the vessel was free from incumbrances, omitting "all the apparel," &c. ; that a conveyance or bill of sale was tendered of the vessel, with the appurtenances, boat, and oars, omitting apparel, tackle, and furniture, leaving them to be inferred from the words "in manner and according to the terms aforesaid." This might have done on general demurrer, but it is not following or averring performance in the terms of the contract, and is, I think, exceptionable in form as a deviation creating uncertainty as to both points—namely, the freedom of all from incumbrance, and the tender of a bill of sale including all contracted to be sold and conveyed.—*Wood v. Russell*, 5 B. & Al. 948 ; 1 Chy. P. of L. 91 ; *Shannon v. Owen*, 1 M. & R. 392.

With respect to the other grounds of special demurrer, I am disposed to think a bill of sale amounted to an assurance within the meaning of the contract, or evidence thereof ; and one additional word would preclude this objection, if a sufficient bill of sale was tendered. I think it sufficiently appears, if not expressed, a reasonable time would be presumed. Until the bill of sale was accepted or the transfer accomplished the defendant could not mortgage the vessel, &c. ; and, unless the plaintiff shews that by what he did the property in the vessel passed, this breach would be rejected, and might be struck out on motion, according to the case of *Lush v. Russell*, 4 Ex. R. 637. But the clause in the agreement binding the defendant to give a mortgage of the vessel with all and singular her furniture, tackle, rigging, boat, oars, and appurtenances, shews that the second ground of demurrer is valid, excepting, as it does, to the omission of the allegation of performance already noticed. If material to be decided, I think the defendants promise to insure is sufficiently stated in the declaration, and that a sufficient consideration is expressed (though it might have been more distinctly done) for the defendant's undertaking to make the promissory notes. The whole contract is to be looked to, and when it is, it shews that in consideration of what the plaintiff was to do the defendant promised to pay him the sum mentioned by instalments as therein specified, and

to secure the same by insuring and by mortgaging the vessel &c., and by his promissory notes, &c.: it is to be read as if it was expressly stated, that in consideration of what the plaintiff was to do the defendant promised to pay, &c., and in order to secure the price agreed to insure and mortgage the vessel, &c., and make the promissory notes.

If the declaration is amended, all ground for objection on this point may also be readily removed. It is alleged to have been on a certain day and on divers days, &c., and seems to me sufficient. I do not find a tender of blank notes for defendant's signature necessary, and if it was, it is immaterial, for the contract had not arrived at the stage for their being made. The breach of contract really is the defendant's not accepting the bill of sale or transfer of the vessel, without which the right of property would continue in the plaintiff; and plaintiff's claim for damages arises out of the defendant's alleged wrongful refusal to go on with the execution of the contract by refusing to accept the transfer of her, &c.: if the property did pass, then the defendant was bound to pay or give the notes, &c., and the breach is sufficient. I do not find that where persons agree to accept bills or give acceptances, as in payment for goods, it is ever averred that bills were tendered for acceptance in actions for the not giving such acceptances or accepting such bills. If the property did not pass, the breach of agreement was the defendant's refusal to accept the transfer thereof or to go on with the contract; and the plaintiff's right of action is for damages by reason thereof, not for the refusal to make promissory notes, &c. It is not necessary to allege that the plaintiff has paid James Mitchell the amount of his mortgage. I think it is averred so far as time goes, but there may have been no actual sale—that is, transfer by conveyance or bill of sale. If the plaintiff obtains leave to amend, it would be prudent to provide against a renewal of any of the objections which the facts will admit of being obviated, by the adoption of more precision in the frame of the declaration.

McLEAN, J., and SULLIVAN, J., concurred.

Judgment for the defendant on demurrer.

BLAKE V. HARVEY.

Non-assumpsit—Evidence thereunder.

The defendant having been arrested at the suit of one Miller, requested the plaintiff to join him as maker of a promissory note to the said Miller for the amount of the debt, which he did, and the note not being paid at maturity, the plaintiff was obliged to pay the same, with costs, &c. The plaintiff then sues to recover the amount paid by him as surety for the defendant, and sets out in his declaration that, in consideration that the plaintiff would join the defendant in signing as maker a promissory note, jointly and severally promising to pay Charles Miller or order the sum of, &c., for defendant's use and benefit, defendant promised the plaintiff to indemnify and save him harmless from the payment of the said sum of money, and any loss or damage which he should suffer by reason of his making the said note. The plaintiff then alleges that he did join with the defendant in making the said note, &c.

The defendant pleads: 1st, Non-assumpsit; 2nd, Set-off; and 3rd, That the plaintiff did not make the note for his accommodation, &c.

Held, That the making of the note was not put in issue by the plea of non-assumpsit.

The declaration states that, in consideration that plaintiff, for the accommodation of defendant, would make a promissory note jointly with him, to one Miller, for 10*l.* 1*s.* 3*d.*, payable the 1st of January then next, defendant promised to indemnify the plaintiff; then alleges that plaintiff, and for the sole use and accommodation of defendant, and without having received any value or consideration therefor, together with defendant, made their promissory note in writing, bearing date the 3rd of April, 1848, whereby they jointly and severally promised to pay to said Miller or order, on the 1st of January next, 10*l.* 1*s.* 3*d.*, &c.; that defendant delivered it to said Miller, who negotiated it—then alleges non-payment by defendant: that plaintiff was sued jointly with defendant and forced to pay the note, interest and costs.

Pleas.—Non-assumpsit and set-off; and thirdly, to first count, that the plaintiff did not make the said note in the said first count mentioned for the *accommodation* and at the request of defendant; to the country and issue.

The cause was tried before Macaulay, C. J., at the last assizes held in and for the United Counties of Frontenac, Lennox, and Addington, when the note mentioned in the first count was produced and placed in the hands of Kenneth McKenzie, Esquire, who was called as a witness for the plaintiff, and proved that the defendant having been arrested by one Miller for a debt of 10*l.* 1*s.* 6*d.* he sent for the plaintiff (who was said to be his uncle) to become his

bail, but that instead of bail, it was arranged that he should join with the defendant as maker of a joint and several promissory note to the then plaintiff, Miller, to be accepted by him in satisfaction of his suit; that he agreed to do so, and accordingly the note in question, bearing date the 3rd of April, 1848, for 10*l.* 1*s.* 3*d.*, payable to Miller or order, on the 1st January, 1849, was made and the suit settled; that the note was transferred to one Stevenson, and not being paid when due an action was brought against the plaintiff and defendant, as makers and Miller as payee and indorser, and judgment was recovered against them; that the plaintiff ultimately paid the debt and costs in that action, amounting to 23*l.* 8*s.* 3*d.*, and which forms the demand in the present suit. He was cross-examined by the defendant's counsel, but was not asked anything in particular respecting the note.

The sheriff was then examined, to prove the full amount levied, including execution and sheriff's fees.

At the close of the plaintiff's case, the defendant's counsel objected that the subscribing witness to the note had not been called to prove it, and that without due proof thereof the first count was not established, under the plea of non-assumpsit, there being no proof of any promise to indemnify the plaintiff, except in so far as implied in and inferable from the giving of the promissory note by the plaintiff as a surety for the defendant. Leave was given to move a nonsuit in this objection and the case proceeded, and the defendant gave evidence in support of the plea of set-off, and after deducting what was proved, the jury found a verdict for the plaintiff for the balance, being 16*l.* 17*s.* 8*d.*, including together the principal and interest of the note and the costs, &c.

In Michaelmas term last, *Henderson*, for defendant, obtained a rule calling on the plaintiff to show cause why a nonsuit should not be entered, contending that the plea of non-assumpsit denied the promise and put in issue the facts, where it was inferred in the absence of any proof of an express promise.—*Sutherland v. Pratt*, 11 M. & W. 296, 314; *Redmond v. Smith*, 7 M. & G. 457; *Lyall v. Higgins*, 4 Q. B. 528; *Raikes v. Todd*, 8 A. & E. 846; *Bennion v. Davidson*, 3 M. & W. 179; *Cowley v. Dunlop*, 7 T. R. 568.

Philpotts showed cause and contended, that the plaintiff was misled if necessary to prove the note, by reason of its not being objected to at a former trial, but that it was not necessary, the note not being put in issue by the pleas to the first count: that Mr. McKenzie's evidence was sufficient to establish a promise to indemnify, and that the note was not denied, but admitted by the plea of non-assumpsit: that the general issue did not traverse the making of the note, which was alleged as made after the promise to indemnify in execution of the agreement, wherefore it was admitted and upon proof that it was in fact made by the plaintiff jointly and severally with defendant, at his request and for his accommodation, the promise to indemnify was implied by law: that the note was clearly admitted as stated in the first count, and being admitted for one purpose it stands admitted for all purposes in that count; and that the consideration or inducement for the plaintiff's making it, and not the making of the note itself, constituted the evidence of an implied promise to indemnify, and that Mr. McKenzie clearly proved that the plaintiff was a mere surety for the defendant: that, at all events, the plaintiff proved that he paid the defendant's debt, at his implied, if not at his express request, and that he was entitled to recover the amount and interest on the count for money paid, and therefore could not be nonsuited.—*Reynolds v. Doyle*, 4 Ju. 992; S. C. 1 M. & G. 753: that the whole case was tried, the verdict right on the merits, and ought not to be disturbed.

MACAULAY, C. J.—Non-assumpsit in special assumpsit operates only as a denial in fact of the *express* contract or promise alleged, or of the matters of fact from which the contract or promise may be implied by law; and applied to the present case, the question is, whether it traverses or puts in issue the execution of the consideration for the defendant's promise—that is, the making of the note as his surety by the plaintiff; or only the facts previously stated and ending with the alleged promise. The declaration states that on the 3rd of April, 1848, in consideration that the plaintiff would join with the defendant in signing as maker a promissory note jointly and severally promising to pay Charles

Miller, or order, 10*l.* 1*s.* 3*d.*, on the 1st of January, 1849, for defendant's use and benefit, defendant promised plaintiff to indemnify and save him harmless from the payment of the said sum of money and any loss or damages which he should suffer by reason of the making of the said note; then follows the allegation that the plaintiff did join with the defendant in making such note, &c.

The defendant pleads that he made no such promise.

No express promise was proved; but it was proved that defendant, being under arrest, at Miller's suit, for the debt or sum of money above mentioned, applied to plaintiff to become his bail, when it was arranged that he should join with defendant as his surety in making a promissory note such as above described, to be accepted by Miller in satisfaction of the demand, and that the plaintiff agreed to become a party as maker of such note, for the defendant's benefit, on those terms. Stopping here, the question is, whether on these facts (without more) the law implies a promise by the defendant to indemnify plaintiff if he would join in such a note at his instance and for his benefit, or whether the *making of the note*, which was to constitute the *consideration* for the implied promise to indemnify, should also be proved.—*Taverner v. Little*, 5 Bing. N. S. 686; *Beech v. White*, 12 A. & E. 668, 672; *Gibbs v. Flight*, 3 Q. B. 603.

Is the making of the note a condition precedent or the consideration for the defendant's promise to indemnify, or was the *promise* prospective and impliedly, made upon, or subject to, or in the event of such condition or consideration being executed, what was the *consideration* for the *promise* plaintiff's undertaking to join as a maker in the note, or actually becoming such a maker?—*Raikes v. Todd*, 8 A. & E. 846; 5 A. & E. 161; 3 N. S. 467; *Tyr. Plg.* 265; *Shilcock v. Passman*, 7 C. & P. 289 *Retainer*—proof of implied promise to use due diligence,—*DePinna v. Polhill*, 8 C. & P. 78; *Gibson v. Harris*, *ib.* 378; *Pickwood v. Neate*, 10 M. & W. 206, 11, 12; *Barnett v. Glossopp*, 1 Bing. N. S. 633; *Chy. J. Forms*, 203, 5, 291, 304, 314; *Sutherland v. Pratt*, 11 M. & M. 296; *Butcher v. Steuart*, *ib.* 873; *Red-*

mond v. Smith, 7 M. & G. 472; Reynolds v. Doyle, 1 M. & G. 753; S. C. 4 Ju. 992; S. C. 2 Moore, 45; Payne v. Wilson, 7 B. & C. 423; 1 M. & R. 708; 3 Wil. 262; Tous-saint v. Martinnant, 2 T. R. 105; Cowley v. Dunlop, 7 T. R. 568; Ward v. Harris, 2 B. & P. 268; 4 Bing. 74; Humble v. Langston, 7 M. & W. 517; Green v. Creswell, 10 A. & E. 453; Seaver v. Seaver, 6 C. & P. 673. Where it is said in some cases the plea of non-assumpsit in actions of special assumpsit puts in issue the consideration as well as the promise (*a*), they mean, not the execution of the consideration, but the consideration alleged, as distinguished from another or a different consideration; and to this extent, no doubt, the rule seems to be so: it is another question whether it also puts in issue the performance of an executory consideration upon an executory or conditional contract.

I cannot say I am free from doubt on this point; but from the cases above referred to, I am disposed to think the weight of authority and argument in favour of the conclusion that in this declaration the making of the note is not traversed or put in issue by the plea of non-assumpsit, which is, that the defendant did not undertake and promise in manner and form alleged.—See *Butcher v. Stuart*, 11 M. & W. 873.

The contract as laid in the first count was executory, and the note is alleged to have been given in execution thereof, and so far as material to be shown, as an execution of the plaintiff's undertaking on his part, it seems admitted by the plea of non-assumpsit, which only denies the promise or executory contract alleged; but an express promise to indemnify was proved; it was proved that the defendant solicited the plaintiff to become a party as maker to a promissory note to Miller, for his debt—or in other words, as a security for him and for his accommodation—and that he consented to do so.—*Chilton v. Cornwall*, 3 Wil 13; *Vanperheyden v. DePiaba*, ib. 528; *Goddard v. Vanderheyden*, ib. 262; *Wallis v. Broadbent*, 4 A. & E. 877; *Gibson v. Harris*, 8 C. & P. 378; *Reynolds v. Doyle*, 1 M. & G.

(*a*) *Dunn v. Sayles*, 5 Bing. N. S. 686; *Beech v. White*, 12 A. & E. 668, 672; *Gibbs v. Flight*, 3 Q. B. 603.

752. The above cases show that if the promise to indemnify was not otherwise proved, it would be necessary to prove the giving of the promissory note, from whence it would be implied also, that if otherwise proved, the note, as given in pursuance of the executory agreement, is not traversed by the plea of non-assumpsit; but there is evidence of a special request on defendant's part that the plaintiff would give him a note and that he agreed to do so, and although no express promise to indemnify accompanied such request, it was implied thereby; and now that the question becomes clearly understood, it appears to me that Mr. McKenzie's evidence proved the executory agreement—that is a request by the defendant and assent by the plaintiff—whence the promise to indemnify is implied by law; if it were not so, the making of the note in execution of the agreement on the plaintiff's part is not denied by the plea; and notwithstanding the doubts thrown upon it by the cases of *Bennion v. Davidson*, 3 M. & W. 179; and *Edmunds v. Groves*, 2 M. & W. 642; as to which see *Bingham v. Stanley*, 2 Q. B. 117; *Mills v. Barber*, 1 M. & W. 425; *Smith v. Martin*, 9 M. & W. 304; *Robins v. Maidstone*, 4 Q. B. 811; *Hyde v. Watts*, 12 M. & W. 269; *Carter v. James*, 13 M. & W. 144; *Roileau v. Rutlin*, 2 Ex. R. 665; *Bonzi v. Stewart*, 4 M. & G. 295, I am disposed to think that for the purpose of that issue—that is, the first issue—the note, not being denied by the plea, is admitted.

It is proper to distinguish between statements material and immaterial, admissions express or implied, and statements in declarations and subsequent pleadings, which the other party might have traversed if so disposed, as well as the matter actually traversed, and those which could not have been traversed without duplicity in the plea or replication; likewise the effect of admissions implied, by not being traversed—or in other words, by waiver of proof thereof in relation to the issue joined, in which the admission is involved, and in relation to other issues arising under other pleas—*Harrington v. McMorris*, 5 Taunt. 228; *Knight v. McDougall*, 12 A. & E. 438; *Gould v. Oliver*, 2 M. & G. 234. The defendant might have denied the alle-

gation that the plaintiff made the note, but has not done so; he only denies the promise alleged, or the facts from which it is implied, if only to be implied by law. The note is not relied upon as proving the promise traversed by the plea, without any evidence; but being admitted the plaintiff proves that it was preceded by defendant's request, and that the plaintiff became a party at his request, for his debt as his surety, and without valuable consideration. The promise to indemnify is not implied or inferred from the giving of the note, but from its being made by the plaintiff at the defendant's request, and for his debt, &c., and that it was so made, was proved by Mr. McKenzie. Whether, therefore, the negotiation be regarded before the note was given, or after it was made, it seems to me the law implies from the premises a promise of indemnity, such as the plaintiff states in his declaration, and that therefore the issue was established in his favour.

In *Bingham v. Stanley*, 2 Q. B. 124, Lord Denman said, "An admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, provided the allegation be material. In *Robins v. Maidstone*, 4 Q. B. 816, he so far corrected himself as to say that it would have been more correct to have said "for all purposes regarding the issue arising from that pleading." This dictum, although controverted in the Exchequer, and to a certain extent, also in the Common Pleas, does not appear to me to be overruled, as applied to an issue joined upon a plea traversing some only of several material allegations in a declaration under circumstances like the present, but rather that the weight of authority is in support of it: at all events, it was proved that the plaintiff had paid the defendant's debt; and if not necessary to prove the note in order to support the count for money paid, by showing that the payment was made in discharge of a note in which the plaintiff had joined with defendant in making, as his surety, the plaintiff, for that reason, could not be nonsuited at the close of the plaintiff's case. At the trial it appeared to me proof of the note was necessary to support

either the special or general counts ; and I am not yet satisfied it was not as necessary to support the latter as the former, being in both alike the foundation or ground of the plaintiff's demand. Being of opinion however that the first count was under the general issue, sufficiently supported by the proof given, independently of the room for holding proof by the subscribing witness waived, if otherwise necessary by the course adopted by the defendant's counsel, in allowing it to be produced and in evidence without objection, I think the rule should be discharged. The defendant had the full benefit of his plea of set off, so far as proved to the satisfaction of the jury ; and the last issue (the third) was correctly proved against him, the plaintiff having clearly proved the affirmative of the matter traversed by the third plea—namely, that the note was made by him for the defendant's accommodation—the verdict is satisfactory on the merits, and, I now think, strictly correct in law and evidence (a).

McLEAN, J., and SULLIVAN, J., concurred.

Rule discharged.

EASTER TERM, 15 VIC.

Present MACAULAY, C. J.

“ McLEAN, J.

“ SULLIVAN, J.

MACAULAY, C. J., not being present after the first day, in consequence of illness.

IN RE DELAHAYE V. THE MUNICIPALITY OF THE TOWNSHIP OF, AND THE GORE OF TORONTO.

By-law—What interest entitles non-residents to move for quashing—Must not be contrary to U. C. Assessment Acts—Certainty required in—Costs.

Where in an application to quash a by-law passed by the municipality of a township, it was objected that the applicant was a non-resident: *Held per Curiam*, That as a freeholder of the township the applicant had an interest in all by-laws passed by the township council sufficient to enable him to move to quash any of them.

Where the municipality of a township, intending to act under statute 13 & 14 Vic. ch. 48, for common school purposes, declared a rate upon the *resident* inhabitants of a school section only—*Held per Cur.*, that under 13 & 14 Vic., ch. 48, as well as the U. C. Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the *taxable property* within the section, whether of residents or non-residents.

Held also, that in such case the court has no discretion, but must quash the by-law with costs.

Quære: Whether in the present case the rate and assessment to be levied were stated in the by-law with sufficient certainty.

This was a rule obtained by *Hallinan* in Hilary Term last, calling upon the Municipality of the Gore of Toronto to show cause why a certain by-law passed by the said municipality, entitled, "A by-law to assess school section No. 5, for the erection and completion of a new school house," should not be quashed with costs, on the grounds:

1st. That the said by-law does not show or describe any right, power, or authority, in or by the said municipality to pass any such by-law; nor does it show any cause, reason, or lawful requirement for the passing thereof.

2nd. That the money directed to be levied by the said by-law, is directed to be levied entirely from the *inhabitants* of the said section, which is contrary to law; because any money which the municipality had power to raise or levy in the said sections, for the purposes mentioned in the said by-law, should be levied on the *householders* and *freeholders* of the said section.

3rd. That the said municipality can only raise money for such common school purposes as mentioned in the said by-law, by a rate declared and ascertained, and that no rate is stated or declared in the said by-law.

4th. That the said by-law is contrary to law, in this, that it attempts to compel the treasurer of the said school section to pay money, contrary to the duties of his office as fixed by law.

5th. That, although the said by-law professes to be for the erecting and completing of a school house, it requires the treasurer to pay the same as soon as a good and valid title for a site for the said school house should have been acquired.

This rule was granted on reading the by-law and the affidavit of John P. DeLaHaye and Peter Lamphier.

The by-law entitled as above enacts, by the Municipality

of the Gore of Toronto—1st, That from and after the passing thereof there shall be raised, levied, and collected on all the taxable property of the *inhabitants* of school section No. 5 in that township, the sum of 100*l.*, to be made in two equal annual instalments, by a rate levied in proportion to the amount of *their* ratable property as appearing on the assessor's roll for the school section No. 5.

2nd, That the clerk of the said township shall, and he is hereby required to furnish the collector appointed by the trustees with the names of all persons assessed for school section No. 5, together with the sum total of the assessed value of their property, severally and respectively residing within the limits of the said school section No. 5; and the said collector is thereby authorized and required to assess, demand, collect, and levy from each *inhabitant* of the said school section No. 5, the sum specified opposite to his or her name; and when so collected and received, to pay the amount into the hands of the treasurer of school section No. 5, deducting not more than 5 per cent upon the gross amount collected for his per centage.

3rd, That the treasurer shall, and he is hereby authorized upon application made by any person or persons entitled by law to receive the same, to pay the said sum of 100*l.*, or so much thereof as shall from time to time come into his hands upon the certificate of the three trustees that a good and valid title for the site upon which the school house shall or may be built has been filed in their office. No date appears. The copy of the by-law is duly certified under the seal of the municipality.

Mr. DeLaHaye in his affidavit states, that he is a freeholder in the township of the Gore of Toronto, and has an interest in the provisions of the said by-law: That under the same he was requested to pay 1*l.* 16*s.* 8*d.*, and that a summons issued out of the Division Court of such township, a copy of which summons was annexed to the said affidavit; and that the said copy was served on him on the 24th January, 1852, to enforce payment of the said sum. The summons is dated the 21st Jan., 1852, 9th Division Court, County of York—between the trustees of school section

No. 5, in the Gore of Toronto, and J. P. DeLaHaye—demanded 1*l.* 16*s.* 8*d.*, and required him to appear at the next Division Court to be holden on the 3rd February, 1852, to answer the plaintiffs' claim as set forth in a claim thereto annexed, being an account headed, "Mr. J. P. DeLaHaye, 1852, to the trustees of school section No. 5, in the Gore of Toronto—to amount for which you were assessed for building school house, 1*l.* 16*s.* 8*d.*."

Morrison shewed cause during the same term, and contended: 1st, That the applicant shewed no right or interest. 2nd, That it is not shewn that the by-law is unrepealed: that it is proper to assess only resident inhabitants, and Mr. DeLaHaye is not a resident in the township, of which fact he filed an affidavit: that the affidavit also shows that the by-law has never been acted upon, and is not intended to be acted upon, and that Mr. DeLaHaye is sued in the Division Court under a warrant of the school trustees, dated the 1st of November, 1851, and issued under the authority of the statute 13 & 14 Vic., ch. 48, sec. 12, No. 8, whereby they directed the collector of school section No. 5, after ten days from date, to collect from the several individuals in the copy of the assessment roll furnished by the clerks of the municipality respectively, so far as related to school section No. 5, for the year 1851, the sum of money opposite their respective names; and in default of payment, on demand, by any person so rated, to levy the amount by distress and sale of goods and chattels of the person or persons making default: that school trustees may levy rates under that act, and that the action complained of is under its authority; that the title of the affidavits is questionable: that the rule is too indefinite: that Mr. DeLaHaye shows no interest, being a non-resident: that the by-law is good; that by the statute 13 & 14 Vic. ch. 48, sec. 12 and 18, No. 9, all taxable property is ratable for school houses; also No. 11, authorizing suits against non-residents, and see also 12 Vic. ch. 81, sec. 31, Nos. 3 and 31: that no recital of a previous application is necessary: that the by-law imports it, and sufficiently declares a rate by directing the amount to be raised, the apportionment of which is

mere matter of computation, and may be made by the collector ; and the reference to the assessment roll implies that all persons assessed thereon and liable to school rates, are intended in the by-law, whether resident inhabitants or not ; that the restriction on the treasurer respecting the title to the site is merely for precaution, and manifestly contemplates the money not being paid unless the school house is erected thereon ; it speaks of a valid title to the site on which the school house shall or may be built : at all events, the payment directed to the trustees is valid, whether it is erected or not.

Hallinan, in reply : That it was too late to take technical objections, as cause should have been shown the previous day ; that Mr. De La Haye has a sufficient interest under 12 Vic. ch. 81, sec. 155, to apply for a copy of the by-law, which being obtained, any one may move to quash it ; that the by-law not having been acted upon, is no answer to this application — the question being its legal validity, not whether it is intended to enforce it or not ; that it ought to show why passed, as upon an application, &c., that only trustees can levy rates on the inhabitants, and the by-law should have declared a rate upon all taxable property— 13 & 14 Vic. ch. 48, sec. 12, Nos. 9 and 2, and sec. 18 ; that it should also declare the rate or amount to be levied on each person, or how much in the pound upon the amount of his assessment ; that the words “opposite his name,” would be the full amount of the assessed value of his property—not the aliquot proportion of the £100, which he, as being so rated, was to pay ; that the provision for payment by the treasure was repugnant ; that he could not pay except on the default of the trustees, and that the restriction as to title, infringes on the rights and duties of both, prohibiting as it does his paying until the title is complete, although the school house may have been built ; that the trustees have no power to declare a rate to erect a school house, but must have a by-law ; *Regina v. The Gov. of Darlington School*, 6 Q. B. 695, as to the power to make such a by-law. Com. Dig. By-Law, c. 7—if bad in part, all fails, unless the good part is clearly separable.

Painter v. Liverpool Gas Co., 13 A. & E. 433—that the power given by the statute, must be followed; that costs should follow if the by-law is quashed. He also offered an affidavit of Archibald McVean, one of the township councillors, that although there had been a meeting of the township council since this rule issued, no resolution was made to resist it, or to direct its resistance, nor was any such proposition submitted to them.

Morrison said he had received instructions from the township reeve, on whom the copy of the rule was served, and who delivered it to him.

MACAULAY, C. J.—The statute 12 Vic. ch. 81, sec. 155 enacts, that any one having an interest in the provisions of any by-law may apply for a certified copy thereof, and that either of Her Majesty's superior courts (13 & 14 Vic. ch. 64, schedule No. 26), may be moved upon the production thereof to quash such by-law, &c.; and if it shall appear to such court that such by-law is in the whole or in part illegal, it may order the same to be quashed in the whole or in part, &c.

Sec. 31, enables the municipality of each township to make by-laws: No. 3—For the purchase and acquirement of such real property as may be required for common school purposes; for building common school houses, &c., and providing for the establishment and support of common schools according to law. No. 31—And for raising, levying, collecting, and appropriating such moneys as may be required for all or any of the purposes aforesaid, &c., by means of a rate or rates, to be assessed equally on the whole ratable property of such township liable to assessment according to any law which shall be in force concerning rates and assessments.

The 13 & 14 Vic. ch. 48, passed the 24th of July, 1850, repealed the former school acts, 7 Vic. ch. 29, and 12 Vic. ch. 83.

Sec. 6, enacts that at every annual school section meeting in any township, as authorized by sec. 2 of that act, it shall be the duty of the freeholders or householders (who are the electors according to sec. 5), of such section, present at such

meeting or a majority of them (No. 4), to decide upon the manner in which the salary of the teacher, and all expenses connected with the operation of the school, shall be provided for.

Sec. 11, provides for the appointment of arbitrators to decide, in any case of difference as to the site of a school house between the majority of trustees of a school section and a majority of the freeholders or householders, at a special meeting called for that purpose.

Sec. 12, enacts that it shall be the duty of the trustees of each school section, among other things (No. 12), to appoint the place, and call and sign notices of any special meeting of the freeholders or householders of such section, for the selection of a new school site, or for any other school purpose as they may think proper, and to specify the objects of such meeting, &c. No. 3, invests and intrusts the trustees with the keeping of all school property. No. 4, authorizes them to do whatever they may judge expedient with regard to the building, repairing, renting, &c., the section school house, &c. No. 7—To provide for the salaries of teachers, and all other expenses of the school, in such manner as may be desired by a majority of the freeholders or householders of such section, at the annual meeting or at a special meeting called for that purpose; and to employ all lawful means provided for by that act, to collect the sum or sums required for such salaries and other expenses; and should the sums thus provided be insufficient to defray all the expenses of such school, the trustees are authorized to assess and cause to be collected any additional rates, in order to pay the balance of the teacher's salary and other expenses of such school. No. 8—To make out a list of the names of all persons rated by them for the school purposes of such section, and the amount payable by each; and to annex to such list a warrant directed to the collector of the school section, for the collection of the several sums mentioned in such list; provided, that any school rate imposed by trustees according to that act, may be made payable monthly, quarterly, half-yearly, or yearly as they may think expedient. No. 2—To appoint a collector to collect the rates they im-

posed upon the inhabitants of their school section or which the said inhabitants may have subscribed, who shall have the same powers, by virtue of a warrant signed by a majority of the trustees, in collecting the school rate or subscription, and shall proceed in the same manner, as ordinary collectors of county and township rates or assessments. No. 11—To sue for and recover by their name of office (see sec. 10) the amounts of school rates or subscriptions due from persons residing without the limits of their school section, and making default of payment—See 14 & 15 Vic. ch. 67, sec. 34. No. 9—To apply to the municipality of the township, or employ their own lawful authority as they may judge expedient, for the raising and collecting of all sums authorized in the manner hereinbefore provided to be collected from the freeholders and householders of such section, by rate, according to the valuation of taxable property as expressed in the assessor's or collector's roll; and the township clerk, or other officer having possession of such roll, is thereby required to allow any one of the trustees or their authorized collectors to make a copy of such roll, as far as it shall relate to their school section.

Sec. 18—It shall be the duty of the municipality in each township (No. 1), to levy such sum by assessment upon the taxable property in any school section, for the purchase of a school site, the erection, repairs, renting, and furnishing of a school house, &c., salary of teacher, &c., as shall be desired by the trustees of such school section on behalf of a majority of the freeholders or householders at a public meeting called for such purpose or purposes, as provided for by the 12th sec. of that act.

12. Vict. ch. 81, sec. 120, requires the amount of the assessed value of the real and also of the personal property of each person whose name shall appear upon such roll, as well as the amount to be collected from such person; and see stat. 13 & 14 Vic. ch. 61, secs. 32 & 34, and 14 & 15 Vic. ch. 110, sec. 9; the former act enacts what property real or personal shall be liable to taxation; and sec. 6 enacts that all taxes to be levied under that act or the 12 Vic. ch. 81, or under any other act passed or to be

passed, whereby any local or district taxes have been or shall be authorized to be levied, and when no other provision shall be made in this respect, shall be levied upon the whole taxable, real and personal, property of the locality to be taxed, in proportion to the assessed value thereof; and not upon one or more kinds or species of property in particular.

Sec. 11—That the sums which shall be required by law or by any by-law of any township or county for any lawful purpose, shall and may be taxed, rated, and raised, upon estimate of the amount required for any such lawful purpose for each year in which such tax is to be levied.

Sec. 10 enacts that the taxable year shall correspond with the current year, reckoned from the 1st of January to the 31st of December, unless otherwise provided for in the by-law, &c., imposing the same.

Sec. 4—What shall be set forth in by-law for creating debts, &c. Sec. 35—As to the costs of quashing by-laws.

Stephen on Corporations, p. 20, explains the meaning of the word *inhabitant* and *resident*—Rex v. Jones, 8 East. 451; Rex v. Nicholson, 12 East. 342; Rex v. Adlard, 4 B. & C. 772; 7 D. & R. 340; Rex v. Inhabitants of North Curry, 4 B. & C. 962; 7 D. & R. 424; Rex v. George, 6 A. & E. 305.

It appears to me that, as a freeholder within the school section, Mr. De La Haye has a sufficient interest in this by-law to entitle him to demand a copy thereof, and having obtained it, to move to quash it. It is not a sufficient objection that the by-law only applies to resident inhabitants, and does not extend to non-residents, like him; he, as a freeholder, is entitled to vote at the municipal elections of the township, and at school meetings of the section in which his land is situated, and as such freeholder has an interest in all the by-laws that affect his property; whether the present one applies to his lands, is a question. He has been sued as one assessed, as he supposed, under the by-laws; it is now said he is sued as assessed under a rate declared by the school trustees of their own authority. The very uncertainty or possibility of a double rate having been

in that event declared, shows that he is interested in the by-law; indeed, it is not easy to see why all the corporations are not interested in all the by-laws of their municipality. He has a right to see that all rates are legally and properly declared and levied, whether the objection be that the by-law declaring them does or does not include non-residents.

Then, as to the by-law itself; it seems to me invalid. Without considering whether it ought to have recited an application from the householders and freeholders of the school section for the rate declared, it ought, I think, to have declared the rate upon the whole taxable or ratable property within the school section; and that, taking the statutes all together, such rate ought to embrace all rated property whether real or personal, or of inhabitants, residents or non-residents; also, that it only declares the rates to be levied upon the rated resident inhabitants, omitting non-residents. I think the 1st and 2nd sections of the by-law together, show that it is only intended to embrace resident inhabitants; so that, if "inhabitants," as used in the 1st section, could be construed to embrace non-residents, the 2nd section shows that it was not so intended, but that it meant resident inhabitants. On this ground, therefore, I think the by-law should be quashed; and it is not necessary to consider, whether if otherwise valid, the rate and amounts to be levied, &c., are not informally and insufficiently declared. I do not see, under the circumstances of this case, that we have any discretion to quash it otherwise than with costs.

By-law quashed, with costs.

MCLEAN, J., and SULLIVAN, J., concurred.

THE PRINCIPAL, &C., OF U. C. COLLEGE AND ROYAL GRAMMAR SCHOOL V. BOULTON.

U. C. College—Change of name—Averments "quod cum."

The plaintiffs, by the name of Upper Canada College and Royal Grammar School, declared on a bond made between the Chancellor, President, and Scholars of King's College and the defendant; and in their declaration aver as follows: "And whereas the said indenture and covenant (although made with the Chancellor, &c., as aforesaid), was so made for and on behalf and for the benefit of the plaintiffs: and, whereas, by virtue of an act of parliament of this Province, passed in the 12th year of Her Majesty's reign, &c., entitled," &c., the plaintiffs are entitled to the benefit of the said indenture and covenants as if the plaintiffs had been named therein as the parties of the second part.

Demurrer—Special causes assigned: 1st. That it does not appear by the said declaration or by the said indenture or covenant as therein set forth, that the said indenture or covenant was made to the parties of the second part on behalf of, or to, or for the use and benefit of the said College, except by averment in the declaration to that effect, which averment is repugnant to the covenant itself as set forth, and can only be supported by parol evidence, which must necessarily alter and vary the effect of the said covenant.

2nd. Also, that if such an averment is admissible, the plaintiffs have not made a direct and positive averment of the necessary fact, but have merely recited such fact, contrary to the rules of good pleading.

Held per Cur.—That the effect of the statutes 12 Vic. ch. 82 and 13 & 14 Vic. ch. 49, was to transfer the covenant from the University of King's College to the plaintiffs: and consequently gives them the right of property in the indenture declared on, and entitles them to recover thereon in the named used; that proof that the covenant was made on the behalf and for the benefit of the plaintiffs, would not be contradicting the deed or covenant; that an averment or a material fact in a pleading, by way of "quod cum," is sufficient.

Writ issued 27th January, 1850 (quære, 1852). Declaration 7th April, 1852. The plaintiff declares in covenant, for that whereas heretofore—to wit, on the 31st of January, 1849—by an indenture dated the 31st of January, 1847, and made between the defendant of the first part, and *the Chancellor, President, and Scholars of King's College at York, in the Province of Upper Canada*, of the second part, the defendant, for himself, his heirs, executors, and administrators, covenanted, promised, and agreed to and with the said Chancellor, &c., (the party of the second part), their successors and assigns, that the defendant, his heirs, executors, or administrators, or some or one of them, would pay or cause to be paid to the said Chancellor, &c., their successors or assigns, the sum of £75, within one year from the date of the said indenture, with the interest at the rate of six per cent. per annum, as by reference to said indenture, &c.; and whereas the said indenture and covenant (although made with the said Chancellor, &c., aforesaid) was so made for and on behalf and for the benefit of the said College and Royal Grammar School; and whereas, by virtue of an act of parliament of this Province, passed in the 12th year of Her Majesty's reign, entitled "An act to amend the charter of the University established at Toronto, by his late Majesty King George IV., to provide for the more satisfactory government of the said University, and for other purposes connected with the same, *and with the College and Royal Grammar School forming an appendage thereof*," the plaintiffs are entitled to the benefit of the

said indenture and covenants as if the plaintiffs had been named therein as the parties of the second part; and the plaintiffs in fact say that a year had elapsed before the commencement of this suit. The declaration then admits payment to the said Chancellor, &c., after the expiration of one year, and after the same became due, and before suit, and when the said Chancellor, &c., was entitled to receive the same—to wit, on the 27th of March, 1852—the sum of £21 15s. on account of the said sum of £72 and interest, and alleges for breach non-payment of the residue either to the said Chancellor, &c., the obligees, or the said plaintiffs, not denying payment to the University of Toronto.

Demurrer: All the grounds specially assigned being waived at the argument except,

1st. That it does not appear by the said declaration, or by the said indenture or covenant as therein set forth, that the said indenture or covenant was made to the parties thereto of the second part on behalf of, or to, or for the use or benefit of the said College or Grammar School, except by an averment in the declaration to that effect, which averment is repugnant to the covenant itself as set forth, and can only be supported by parol evidence, which must necessarily alter and vary the effect of the said covenant.

2nd. Also, that if such an averment is admissible, the plaintiffs have not made a direct and positive averment of the necessary fact, but have merely recited such fact, contrary to the rules of good pleading.

Eccles, for the demurrer, referred to the statute 12 Vic. ch. 32, secs. 32, 33, 34, 37, 66, 97, and 98, and contended that the effect thereof, especially of secs. 33 and 67, was not to transfer to the plaintiffs, a right of action to bonds given to the obligees named in the present bond, unless that it appeared on the face thereof, that it was so given for and on behalf and for the benefit of the plaintiffs: that it is not alleged or shown in this declaration that such is the import of the bond on the face of it, and if not, that it cannot be averred and proved *aliunde*, either by oral or written evidence; that the obligees were mere trustees for the plaintiffs.

Moreover that it could not in fact have been so made for or on behalf or for the benefit of the plaintiffs, who had no separate corporate existence at the time, and did not in fact exist at all, so as to be entitled to the benefit of covenants for the payment of money, being virtually merged in the obligees, or at all events being dependent upon them for the arrangement of the property and moneys, &c., that might otherwise have belonged to the Grammar School as formerly constituted; at all events, that the fact is not averred, but only recited—*Brown v. Thurlow*, 16 L. J. Ex. 461; 4 D. & L. 301, S. C.

Connor, Q. C., in reply, referred to stat. 7 Wm. IV. ch. 16, sec. 2, and contended that the plaintiffs had a separate existence formerly; and although afterwards attached to the University as an appendage, it was not merged therein, but continued to exist as a separate establishment: that the late Act 12 Vic. ch. 82, separated it again, and vested in it as a distinct corporation all property, moneys, &c., held by the University for or on its behalf, under the provisions of the previous laws; and that, under 167, it was competent to the plaintiffs to aver and prove even by parol, if traversed or denied, that the covenant in question was made to the covenantees for moneys due to the plaintiffs—in other words, for and on their behalf: that the identity of the Grammar School has been proved throughout, and the present name, which expresses such identity, is the proper one, and only one in which the action could have been brought, because the interest in the covenant ceased to be in the covenantees, and was transferred to the plaintiffs; that the covenantees therein named, could not sue on it, either in the name expressed, or in that substituted by the 12 Vic. ch. 82; and if they could, they could only recover in trust, and to and for the use of the plaintiffs—which proves that the right of action on the covenant, as well as the proceeds when recovered, has been transferred to them by the last mentioned act.

MACAULAY, C. J.—The first legislative notice of the Upper Canada College is in the statute of 7 Wm. IV. ch. 16, which in sec. 1 provides for “the Principal of the

minor or Upper Canada College," being one of the College Council of the University of King's College.

Sec. 2nd—reciting the expediency of the minor or Upper Canada College, lately erected in the City of Toronto, being incorporated with and forming an appendage of the said University—enacted, that the said minor or Upper Canada College should be incorporated with and form an appendage of the University of King's College, and be subject to its jurisdiction and control.

Secs. 3, 4, and 5, provide for the appointment of the principal, vice-principal, and tutors of the said minor or Upper Canada College, and for their suspension or removal, &c.

This act was repealed by the statute 12 Vic., ch. 82, passed 30th May, 1849, which by sec. 3 changed the name and style of the said University to the Chancellor, Masters, and Scholars of the University of Toronto, &c.

Sec. 32 enacted that all the property and effects, real and personal, of what nature or kind soever, then belonging to or vested in the Chancellor, Masters, and Scholars of the said University of Toronto, &c.

Sec. 38 enacted that all debts due to the said University, or to the Chancellor, President, and Scholars thereof, in their corporate capacity, and all judgments, recognizances, bonds, covenants, and other instruments or contracts, suffered, acknowledged, or given, to or made with them as aforesaid, by whatsoever name the same may have been suffered, acknowledged, given, or made, should be available, stand, and continue of good purport and full force and strength to the Chancellor, Masters, and Scholars of the University of Toronto, as if the said University had been therein named by the corporate name thereby given to the same; and that it should and might be lawful for the said University, by the corporate name last aforesaid, to proceed upon the same by execution or otherwise, and recover thereon, as if the same had been suffered, acknowledged, or given to or made with them by the name last aforesaid.

Sec. 51 recites that part of the 7 Wm. IV. ch. 16, which enacted that the college then lately erected in the City of

Toronto should be incorporated with and form an appendage of the said University, and that it was expedient while maintaining the said College as an appendage of the said University, to confer on it a more independent organization for the regulation of its own affairs than it then possessed, and enacts that the Principal, Masters, and Scholars of the said College should henceforth, by and under the name of The Principal, Masters, and Scholars of Upper Canada College and Royal Grammar School, be a body corporate, &c.

Secs. 31, 32, and 59, provide for the establishment of an endowment board for the said University and the said College and Royal Grammar School, to take upon themselves (sec. 59) the general charge, superintendence, and management of the whole *property and effects*, real and personal, of the said College and Royal Grammar School, under the direction of such college statutes as should or might be passed for that purpose, &c.

Sec. 66 enacted that whatever shall remain of the original endowment of the said College and Royal Grammar School, whether the legal titles thereto be now vested in the said College and Royal Grammar School, or in the Principal, Masters, and Scholars thereof, or in the said College, collegiate institution or university, and all other the *property and effects*, real and personal, of what nature and kind soever, now belonging to or vested in the said College and Royal Grammar School, or in the Principal, Masters, and Scholars thereof, or in the said College, collegiate institution, or university, or in any other person or persons, or body corporate, or politic whatsoever, for the *use or benefit* of the said College and Royal Grammar School, shall be and the same and every part thereof are hereby *transferred to and vested in the Principal, Masters, and Scholars* of Upper Canada College and Royal Grammar School, forever, &c.

Sec. 67 enacts that all debts due to the said College and Royal Grammar School, or to the Principal, Masters, and Scholars thereof in their corporate capacity, and all judgments, recognizances, bonds, covenants, and other instruments or contracts, suffered, acknowledged, or given to, or

made with them as aforesaid, or *with* the said collegiate institution or university hereinbefore mentioned, *on behalf of the said College and Royal Grammar School*, or with the Chancellor or President of the said University *on behalf of the said College and Royal Grammar School*, by whatever name the same may have been suffered, acknowledged, given, or made, shall be available, stand, and continue of good purport and full force and strength to the Principal, Masters, and Scholars of Upper Canada College and Royal Grammar School, as if the said College and Royal Grammar School had been therein named by the corporate name hereby given to the same; and it shall and may be lawful for the said College and Royal Grammar School, by the corporate name last aforesaid, to proceed upon the same by execution or otherwise, and recover thereon, as if the same had been suffered, acknowledged, or given to or made with them by the name last aforesaid. The statute 13 & 14 Vic. ch. 49, passed 10th August, 1850, sec. 10, enacts that all sums of money received by the bursar of the said University for or on account of the said College and Royal Grammar School, at any time since the royal assent was given to the said act of 12 Vic. ch. 82, and *all debts* of what nature or kind soever, at the time when such assent was given to the said act due to the said College and Royal Grammar School, or in which such College and Royal Grammar School was then or any time after *beneficially* interested, shall be deemed and taken to be *available* to and *collectable* by the Principal, Masters, and Scholars of Upper Canada College and Royal Grammar School in the same manner as the debts mentioned in the 77th (quære, 67) section of the said act, and are thereby declared to be recoverable, subject to the deduction therefrom of all moneys which since the royal assent was so given to the said act, shall and may have been paid by the said bursar for and on account of the said College and Royal Grammar School.

The dates laid tend to create difficulties: the writ is alleged to have been sued out on the 27th January, 1850,

which (although it was after the stat. 12 Vic. ch. 82 came into force) was before the cause of action accrued, which was at the end of one year from the 31st January, 1849. Then, although it is assumed that the effect of the 12 Vic. ch. 82, which came into force on the 1st of January, 1850, was to transfer the right and property in the covenant declared upon to the plaintiffs, yet it is alleged that a year had elapsed—to wit, on the 31st January, 1850—*before* the commencement of this suit, and that the defendant *thereafter* and *before* this suit, and while the said Chancellor, President, and Scholars of King's College were entitled to recover the same, paid them 21*l.* 15*s.*, on account of the said principal sum of 72*l.* and interest—to wit, on the 27th March, 1840—although the name of the obligees had been changed by the 12 Vic. ch. 82, before that day; and the University of Toronto was not then entitled to receive the same. All such objections, however, having been waived at the argument, I suppose we are not to notice when the action was brought by reference to the date of the issue of the writ, but by reference to the date of the declaration—that is, the 7th of April, 1852; a period when the case was out of court by the lapse of time, as compared with the commencement of the suit as laid—that is, on the 27th January, 1850.

Assuming the action to have been brought on the 7th of April, 1852, or at all events within the year 1852, and confining attention to points relied upon at the argument:—

1st. It appears to me that the effect of the stat. 12 Vic. ch. 81, sec. 67, and 13 & 14 Vic. ch. 49, sec. 10, was to transfer the covenant from the University of King's College to the plaintiffs, and that it never vested in the University of Toronto; I look upon it as virtually assigned by statute, and as resembling or bearing analogy to cases wherein the assignees of bankrupts or of insolvents, &c., or wherein joint stock companies are empowered to sue, the former in their own name, and the latter in the name of some individual officer of the company, upon instruments and securities &c., given to and in the name of bankrupts, insolvents, or companies, or assignees of rail bonds, replevin bonds, Indian bonds, certain Irish judgments (a).

(a) O'Callaghan v. Thormond, 3 Taunt. 82.

The statute 12 Vic. ch. 82, sec. 67, enacts that all covenants, &c., given to or made with the said University on behalf of the said College and Royal Grammar School, by whatever name the same may have been given or made, shall be available, &c., to the plaintiffs, as if named therein by the name thereby given to them, who may proceed by such name to recover thereon, &c. The 13 & 14 Vic. ch. 10, enacts that all debts, of what nature or kind soever, due to the said College and Grammar School, when the 12 Vic. ch. 82, was passed, or in which such school was then beneficially interested, should be available to and collectable by the plaintiffs, &c.

The 12 Vic. ch. 82, sec. 66, and other sections, imports that the plaintiffs had an independent quasi corporate existence before the passing of the 7 Wm. IV., ch. 16, and had been previously endowed with real estate, and enacts that all the property and effects, real and personal, of what nature or kind soever, then belonging to or vested in the said University for the use or benefit of the plaintiffs, should be thereby transferred to and vested in the plaintiffs for ever. These clauses seem in the most comprehensive terms to transfer the right of property in the present case to the plaintiffs, and likewise to enable them to recover therein in their present name—that is, if such covenant was vested in the University for the use or benefit of the plaintiffs, or was made with such University on behalf of the plaintiffs, or if it constituted a debt in which they were beneficially interested.

These acts shew that, after the 7 Wm. IV., ch. 16, the University did become vested with property, and received moneys, &c., for the plaintiffs, and were therefore, in relation to certain property and securities, real and personal, the trustees for the College and Grammar School; they also show that all such interests were to be transferable from the trustees to the cestui que trust, and to be available to and collectable by the latter in the plaintiffs' name.

Then it is contended that unless such trust appears on the face of the security or instrument, it cannot be averred or proved aliunde, because the effect would be to alter or

contradict the deed or writing by parol, or it might be by oral evidence. I think we must give effect to the statute; and that proof, whether it be under seal, in writing, or oral, by the officers in charge of the financial affairs of the University; that the said covenant was made for and on behalf of and for the benefit of the College and Royal Grammar School, would not be contradicting the deed or covenant, but consistent therewith. It would be merely proving the consideration on which such covenant was founded, and which is not expressed therein; *Gardner v. Bredon*, 1 Co., 176; *Peacock v. Monk*, 1 Vez. sr. 128; *Tull v. Purlett*, 1 M. & M. 474; *Gale v. Williamson*, 8 M. & W. 408; *Rex v. Scammonden*, 3 T. R. 474; *Rex v. The Inhabitants of Laindon*, 8 T. R. 382; *Rex v. Llangunnor*, 2 B. & Ad. 616; *Clifford v. Turril*, 9 Jur. 633. Such proof, were the proceeding by the plaintiffs against the University, had the latter received the money, would show a resulting trust or a trust to be inferred from the fact the consideration moving from the plaintiffs; it is merely proving a collateral fact by a third party, not an immediate party to the deed—*Wilson v. Hart*, 7 Taunt. 295; *Magee v. Atkinson*, 2 M. & W. 440; *Rex v. Wickham*, 2 A. & E. 517; *Randoll v. Bell*, 1 M. & S. 715; and would be admissible in an action for money had and received. The covenant is only a security for the payment of a debt; and if the University, being entitled to collect debts due to the College, took a covenant for the payment thereof from the debtor, the fact of its being ultimately paid under such covenant, would be no obstacle in the way of the College claiming the money after it was recovered.—*Humble v. Hunter*, 12 Q. B. 310. It appears to me, therefore, it is only giving effect to the statute, and not contradicting, but consistent with the covenant, to allow the plaintiffs to aver, and if traversed to prove, that in point of fact the covenant was made for the payment of a debt due to them—in other words, for and on their behalf and benefit.

The remaining question is, the formal objection that the plaintiffs' title to the covenant is not expressly averred, but stated by way of recital under the word "*whereas.*" The making of the covenant to the University, is thus prefaced

or introduced ; and it is the common course of declaring in assumpsit, covenant, and debt, upon written or sealed instruments to begin the declaration with the words, for that, *whereas*, the defendant, &c., made the agreement, bill of exchange, promissory note, covenant, indenture, or bond ; after which, unless some special matters require to be averred, it proceeds to allege a breach of the undertaking, &c., in express terms. Although founded on the instrument, the gist of the action is the breach of contract, which must be answered unless the instrument itself is denied ; and it may be traversed, although the making be alleged after a *whereas*.

The case of *Brown v. Thurlow* (a), cited by Mr. Eccles, in case for tort, in the use of slanderous words, and in this respect, distinguishable from assumpsit, covenant, or debt, the court held that the word “ *whereas*,” overrode the whole declaration, including the special damage, as if it had been repeated ; wherefore, the *gravamen* of the charge was only stated by way of recital or inducement, and the cause of action was not positively averred. That case and the present, are not therefore identical. Here the making of the covenant to the University is stated after *whereas*, and correctly so stated ; it being made on behalf and for the benefit of the plaintiffs, and their title thereto as if named therein, are also preceded by the same, “ and *whereas* ;” but there follows a positive allegation of non-payment, which is the ground of action, or that which is complained of as constituting a right of action, or without which no such right of action would arise or vest. The making and endorsing of bills of exchange and promissory notes are stated in like manner, the bill or note and its transfer being only inducement to the ground of action, which is the breach of the contract. Thus far, therefore, the plaintiff’s right under the statute, is averred in terms similar to those in which the making of the covenant is alleged. My only difficulty is, that the plaintiffs are not parties to the instrument directly, but make title indirectly, through the medium of the statute. The same thing may be said of indorsers who make title by the law

(a) 16 L. J. Ex. 461 ; S. C. 4 D. & L. 301 ; S. C. 16 M. & W. 36.

merchant through the medium of indorsements—Stephen's Plg. 427 m; Ring v. Roxborough, 2 C. & J. 448; 4 Tyr. 468, S. C.; Sherland v. Heaton, 2 Bul. 214; where a distinction is taken between cases where the thing for which the action is brought hath continuance—or where it is done and past in the use of the "*quod cum*," as in actions of ejectment founded on a lease or on bonds, &c., which continue, and the *quod cum* admissible, and in actions of tort for wrongful acts done and past.

In contracts, the Statute of Limitations runs from the time of the breach; in tort, from the time of the wrongful act committed (*a*). Here the fact which constitutes the cause of action, or which creates a vested right of action, is positively averred—namely, the breach of covenant, or non-payment. In cases of tort, it is the wrongful act alleged; and the ground of action may in both forms of actions—*i. e.* of tort or covenant—be matters of commission or omission.

In these cases, there is a positive charge upon the defendant, and the *quod cum* being a branch of the whole period, and making one sentence with the latter part of it, it is a positive affirmation; and therefore, being equally positive, it is equally traversible with the latter part; and therefore a man may plead *non est factum, non mutuatus, non demisit*; because, though these come under the *quod cum*, yet taken together with the rest of the sentence, being positive, they make substantive issues of themselves.

Although a positive averment of the fact, showing the plaintiffs entitled to sue on this covenant, would have been more unexceptionable, still I am not satisfied the averments as made are not sufficient even on special demurrer. The authorities above mentioned show that the material allegations might be traversed, though introduced with a *quod cum*. The whole constitutes inducement to the breach, which is distinctly alleged. The plaintiffs' interest in the covenant, &c., is recited or alleged with a *quod cum* in the same manner as the making of the covenant itself; and I do not think in the averment of such interest, whereby the plaintiffs

(*a*) Douglas v. Hall, 1 Wil. 99; Wilkes v. Wood, 2 Wil. 203; Smith v. Kemp, 2 Sal. 636; 2 Show 27, 295; Dobbs v. Edmunds, 2 Ld. Rayd. 1413.

became entitled by virtue of the statute, is making title within the meaning of the rule that where title is made, it must be distinctly shown. The plaintiffs' title certainly does not appear on the face of the covenant, as it usually does when a written instrument, sealed or not sealed, is declared upon by the original party thereto, and it is no doubt usual to allege assignments positively when the assignees sue thereon; still I am not satisfied that being alleged with a *quod cum*, and as inducement to the breach, the title acquired as the plaintiffs' is, may not be so alleged, or that it is not averred with sufficient certainty. The defendant might traverse the making of the covenant as alleged, or the plaintiff's title to sue thereon as alleged, and I do not perceive any sound principle upon which the averment of the latter may not be made in the same form as the former. The above extract from Ba. Ab. Pleas and Pleadings, seems to sanction this view; the case of *Brown v. Thurlow*, is not against it, though it renders it a doubtful question; and on the whole, I think the best conclusion to be drawn is that the declaration, so far as relates to the use of the *quod cum* to each averment is sufficient, and that therefore judgment should be against the demurrer. I will only further repeat that our judgment is upon the two points only, treating the other exceptions as waived, or not urged in support of the demurrers.

Per Cur.—Judgment against the demurrers.

TORRANCE ET AL V. HAYES ET AL.

Plea setting up custom—Averment of notice—Wharfinger not agent of forwarder.

Plea—that according to the custom and usage of forwarders and carriers existing at Toronto, consignees are authorized to pay wharfingers the amount due from them to such forwarders and carriers, for the forwarding and carrying of their goods

Held per Cur.—That assuming the alleged custom to be valid, notice thereof to the plaintiff, if not acquiescence therein, should be alleged.

Semble—That a wharfinger is not an agent of the forwarder, to whom the consignee is authorized to make payment, after the delivery of the goods to the consignee, and after an account has been stated between him and the forwarder.

Writ issued the 4th of March, 1852—Declaration, 13th March, 1852.

Assumpsit :

1st count—£50 work and labour by plaintiffs' servants, steamers, and vessels, &c.

2nd count—£50 for carriage of goods in steamers and vessels of the plaintiffs for and at the defendant's request, &c.

3rd count—£50 money paid.

4th count—£50 upon an account stated.

Pleas, 25th March, 1852.

3rd plea—That the several sums of money in the declaration mentioned, accrued due as therein named to the plaintiffs, as forwarders and carriers by water, of goods, &c.—from, to wit, the city of Montreal to the city of Toronto, to be there delivered to divers persons, to wit, to the defendants and others ; and that according to the custom and usage of such forwarders and carriers, there were at the time of the payment after named, existing at Toronto aforesaid, persons to whom goods, &c., (forwarded and carried by such forwarders and carriers) are delivered by a wharfinger at Toronto, aforesaid, to whom the same have been delivered by such forwarders and carriers respectively, and authorized (*when not notified not so to do by such forwarders and carriers*, who may have delivered such goods, &c., to such wharfinger) to pay such wharfinger the amount due from them to such forwarders and carriers, for the forwarding and carrying such goods, &c., and for moneys paid by such forwarders and carriers in relation and incident to forwarding and carrying ; and that the moneys in the said declaration mentioned, accrued due to the plaintiffs, and the account therein mentioned was stated, in respect of the forwarding and carrying by the plaintiffs from Montreal to Toronto aforesaid, as forwarders and carriers first aforesaid, goods, to wit: 100 kegs of nails, and 3 cwt. of sugar, and in respect of moneys by them paid as such forwarders and carriers in relation and incident to such forwarding and carrying : and that the said goods, &c., were delivered by the plaintiffs, then being such forwarders and carriers as aforesaid, to one Robert Maitland, then and at the time of the payment after mentioned, being a wharfinger at the said city of Toronto, and thereafter by him to the defendants ;

and that thereafter the defendants, according to such custom and usage aforesaid, paid to the said Maitland, then being such wharfinger as aforesaid, and said Maitland then accepted and received of the defendant, the said several sums of money in the declaration mentioned, in full satisfaction and discharge thereof: Verification. Special demurrer—grounds:

1. That in the said plea a local custom affecting forwarders and carriers by water of goods, &c., is stated to exist at the city of Toronto, binding on the plaintiffs as such forwarders and carriers, but does not state that the plaintiffs had notice of any such custom.

2. It is not alleged that the defendants were not notified not to pay the wharfinger, &c.

Galt, for the demurrers, relied upon the objection that no notice of the alleged custom ought to have been, and was not averred; that, being a local custom, it constituted a matter of implied agreement; and that notice of the custom whence the agreement was implied, was material to be alleged.

Leith, in reply, contended that notice was not necessary; that it is the alleged custom of the plaintiffs' trade: that they were bound to take notice of such custom as affecting it; in short, that the averment of the custom and of the plaintiffs' trade virtually included notice—*Stewart v. Aberdeen*, 4 M. & W. 211.

Galt, in reply, said the question was, whether the payment as pleaded, was good without any allegation of notice, and again urged that it was essential.

MACAULAY, C. J.—Upon referring to the case cited and others therein mentioned, I think that, assuming the alleged custom to be valid, notice thereof to the plaintiff, if not acquiescence therein, should be alleged: what would constitute evidence of such notice if the fact was decided, is another question. It is set up as varying the promise implied by law to pay plaintiff on request, and virtually constituting a special contract between the parties, and binding in the plaintiffs, that the defendants should pay the wharfinger, and yet it is not averred that the plaintiffs knew of any such alleged local custom.—*Read v. Rann*, 10 B. & C. 441.

There are other objections to the plea. In the first place it is a question whether the custom as alleged, must not be construed to mean a custom to pay the wharfinger the freight on delivery of the goods, and while he might be supposed to have a lien thereon, especially if furnished with a statement of the freight and charges by the forwarder or carrier; but at all events, it cannot be construed to mean that after the delivery of the goods without exacting payment, and it may be without knowing the charges for carriage, &c., and after the amount thereof had been ascertained by an account stated between the carrier and consignee, the latter could go and pay the amount so ascertained to the wharfinger from whom he received the goods. If, by the custom, the wharfinger is the agent of the carrier to receive the freight, &c., having delivered the goods, and so delivered them without incurring any liability to the carrier for such freight, by reason of such delivery, or until actually received, I do not think he is, therefore, his agent to receive payment of moneys found due to such carrier upon an account stated between him and the consignee after the delivery of such goods, because the account stated, was in respect of the carrier's claims for the carriage thereof.

The plea is to the whole declaration, including the account stated; had that count stood alone, the inapplicability of the plea, would be more striking; but being partly pleaded thereto, it is bad in part, and consequently bad in toto—Stephen's Plg. 448. To support the plea, it must be allowed as a valid custom binding on the plaintiffs without notice, that although a wharfinger had no directions to demand freight, or to hold goods as subject to him therefor, he might exact freight notwithstanding at the time of delivery, or might deliver on credit, or without receiving payment of the freight, and without incurring any liability to the forwarder for the amount; and afterwards (although his duty as wharfinger had been performed and at an end, and his own charges paid), be continued the agent of the forwarder to receive payment for him at any future period, even after on an account stated, unless the consignee was forbid paying him. It is virtually a custom entitling the

wharfinger to deliver the goods with credit for the freight without incurring any responsibility, and yet entitling him to be regarded as still continuing the forwarder's agent, and entitled to receive the amount. I question whether any such custom could be recognized in law. A custom to pay on delivery, and while a lien for the freight remained, is quite another thing. If this is all the plea amounts to, it is bad, because the payment was not so made; if it means to set up a custom entitling the consignee to pay the wharfinger after the goods have been delivered and all lien gone—as being a continuing agent of the forwarder or consignee—I am not prepared to say such a custom could be sanctioned in law; at all events, I am clear the custom as pleaded, did entitle the defendant to pay the wharfinger without the plaintiffs' knowledge of such a custom being averred, or after and in discharge of a sum found due upon an account stated between the parties.

Per Cur.—Judgment for the demurrer.

CANE V. REID.

New trial on the evidence.

In an action for seduction, where the person seduced in giving her evidence, declared that another person whom she had formerly charged with being the father of the child had been so charged falsely by her, and that the defendant was the father of the child, and her evidence having been contradicted and shaken in many particulars, the amount of the verdict being considerable, the court granted a new trial on payment of costs.

Case for the seduction of the plaintiff's daughter.

Plea—not guilty.

This case was tried before the learned Chief Justice of the Court of Queen's Bench, at the last Toronto assizes, and a verdict rendered for the plaintiff, and £100 damages.

The defendant has moved for a new trial without costs, or costs to abide the event, on the ground that the verdict is contrary to evidence and the judge's charge, and contrary to the weight of evidence; also, on the ground that new and important evidence has been discovered since the trial, and on grounds disclosed in affidavits and papers filed.

On the trial, the plaintiff's daughter swore that the defendant was the father of the child—that he had seduced her in the kitchen, in the absence of his wife and daughter, and that he never had intercourse with her but on that occasion. She at first stated that the defendant had used violence with her—that he took her into a bed-room, when no one else was in the house, and effected his purpose, in consequence of which she became with child; but she afterwards stated that it was on the bed of a servant-man of the name of Stepney, that the defendant had connection with her; that she told him to let her alone; that the defendant said he would not hurt her, and then she did not resist him. She also stated that she had never said that Stepney was the father of her child, but on being further questioned, admitted that before charging the defendant with being the father, she had said at Mrs. Shaver's, in presence of several persons, that Stepney, who was a servant at the defendant's, was the father; but then she alleged that she had been induced to do so by the defendant, and that he had promised if she did so not to see her want. She admitted having said at Mrs. Shaver's on two occasions to Mrs. Shaver and Nancy Gleeson, and to a Mrs. Conlevan, that Stepney was the father, but denied having made such a declaration to a Mrs. Styles, who was subsequently called on the defence, and contradicted her in that respect. She denied that Stepney had visited her while living at John Reid's after leaving the defendant's on the first occasion; but John Reid when called, proved that Stepney had frequently visited her while there, but that he suspected nothing and saw nothing wrong.

On the defence, the defendant swore positively that it was utterly false that he was the father of the child, and that he never had any connection with her. It was proved by the testimony of one witness, that plaintiff's daughter, the party seduced, had been seen on a bed with Stepney, and by several witnesses, that she acknowledged that Stepney was the father of her child. It was also proved by the testimony of John Reid, and of Alexander McKindlay, and of a Mrs. Gleeson or Conlevan, that the plaintiff had expressed his displeasure that his daughter had charged

the old pensioner Stepney with being the father of her child, and had said that he would have cared nothing, or less about it, if she had laid it to a respectable man like William Reid, or that he would rather she had three by William Reid, than one by the old pensioner. Some witnesses were called as to the character of the daughter and of the plaintiff and his family, and they testified that, so far as they knew, they were respectable, and that they were not aware of anything against them.

McNab, in support of the rule, referred the court to the judge's notes of the evidence given at the trial, and particularly to that part of the evidence in which the seduced stated that she never had connection with any person but the defendant, and with him but *once*; and argued that sufficient grounds for a new trial appeared from the evidence of the seduced alone.

Connor, Q. C., shewed cause, and contended that the verdict was supported by the evidence, and that the story of Stepney being the father of the child, showed improbability on the face of it.

McLEAN, J.—The verdict necessarily rests upon the testimony of the plaintiff's daughter, and to sustain a verdict, such testimony should be unimpeached and undoubted. It is easy to charge a person in the situation of the defendant with seduction; and, if the character of the girl seduced has been good, it is extremely difficult to meet such a charge or to disprove it. In this case, the defendant has in express terms, contradicted the girl, and denied any connection with her. She herself says that such a connection only occurred once, and in the first part of her testimony, she said it was accomplished by violence. She is sworn to have been seen on a bed with Stepney while living at the defendant's, and she told several persons that the child was his, before charging the defendant with being the father. At first she denied having made such a statement, but eventually admitted having done so, but alleged she had done so by the persuasion of the defendant. Under any circumstances, if her statement be true that the defendant induced her to lay her child to Stepney, it is pretty evident that her consenting

to lay a false charge against a person whom she declares to be innocent must necessarily weaken her claim to be believed. Besides the discrepancies in the testimony of the principal witness, and the various contradictions by other witnesses of portions of her evidence, the defendant swears that he has discovered since the trial other new and important testimony, and he produces an affidavit of a person sworn to be of a respectable character, of a conversation which was overheard between plaintiff's daughter and Stepney, in the course of which it was admitted that Stepney was the father of the child, but it was arranged between them that the child should be laid to the defendant, as he was a man of property, from whom something might be obtained. The defendant also swears that he will be able on another trial to prove that Bridget Cane, plaintiff's daughter, has been a person of loose and bad character. Under all the circumstances the testimony does not appear such that a verdict of considerable amount can properly be allowed to rest upon it. It is not merely that it is contradicted pointedly and unequivocally by the defendant, but it is liable to so many objections as it was given, and has been contradicted and shaken in so many particulars by other witnesses, that it appears to me that a verdict based upon it cannot properly be sustained. I think, therefore, that there should be a new trial, but I can see no sufficient reason for its being granted without costs, or with costs to abide the event. The jury were entitled to believe the party whom they considered most entitled to credit, and they chose to believe the plaintiff's witnesses, though her testimony was not without suspicion. The new trial, under such circumstances, can only be on payment of costs.—Costs to be paid by the first day of next term.

SULLIVAN, J., concurred.

Rule absolute for new trial, on payment of costs.

NOTE—*Macaulay*, C.J., not having been present during the argument, gave no judgment.

BROWN V. STYLES ET AL.

Payment of money collected—Bond.

The plaintiff sues on a bond made by defendant to him to recover moneys collected by Styles under a by-law of the District of Huron Municipal Council, passed to collect the sum of 25*l.* within School Section No 8, to build a school house therein; the condition of the bond being, that the defendant Styles was bound to collect all the taxes due to the treasurer of the Huron district from the township of Blanshard for the year 1849, and pay over the same to the plaintiff as treasurer, &c.

Held, per cur., That all moneys collected for the erection of school houses under any by-law of the District Municipal Council were payable, not to the superintendent, but to the district treasurer, who alone under the late act was authorized to take security from collectors for the payment of moneys collected for public purposes, and that the plaintiff is entitled to recover on the bond sued upon.

Writ issued 9th November, 1850.

Declaration, 2nd September, 1851—For that whereas defendants, on the 9th April, 1849, by the irwriting obligatory under seal, become bound to the plaintiff, as treasurer of the United Counties of Huron, Perth, and Bruce, in 300*l.* Breach—Yet though after requested, did not pay, &c.

Pleas—9th September, 1851—Defendants crave oyer of the bond and condition, which are set out. The plaintiff in the bond is described as treasurer of the county of Huron—the penalty, 300*l.*—dated 9th April, 1849.

The condition is, that if the defendant Edward Styles should collect or cause to be collected all the taxes due the treasurer of the Huron district from the township of Blanshard for the year 1849, for which he had been appointed collector, and pay the same to the said treasurer—excepting his own lawful fees—on or before the third Monday in December of said year 1849, then to be void, &c.

Pleas—1. Non est factum.

2. That said Edward Styles from time to time, and at all times after the making of the said bond, did well and truly observe, perform, fulfil and keep the conditions, payments, and agreements in the said condition mentioned, &c.

Replication.—12th September, 1851.

1. Similiter to first plea.

2. Similiter to second plea denies general performance—traversing the terms in which it is alleged in the plea; then alleges by way of special breach, that said Styles was appointed collector of the Township of Blanshard, for collecting all taxes of the said township, and paying

the same to the treasurer of the Huron district—now treasurer of the united counties of Huron, Perth, and Bruce, &c., acted—to wit, from the 9th April, 1849, to the 1st January, 1850—as such collector, and divers sums of money, amounting—to wit, to 300*l.*,—were after said bond—to wit, on the 17th December, and divers days between that day and 1st January, 1850,—received by him as such collector, yet he did not pay over the same, or any part to plaintiff, although treasurer, &c.—Verification.

Rejoinder, 23rd September, 1851—That said Styles did, on the third Monday in December, 1839, pay over to the plaintiff as such treasurer, all the moneys collected and received by him as such collector, excepting his own fees, according to the condition of the said bond; concluding to the country and issue.

This cause was tried at the last assizes held at Goderich, &c., when it appeared in evidence that by a by-law of the Municipal Council of the district of Huron, passed in February, 1849, No. 9, (printed copy, page 59), entitled, “By-law to raise by assessment in school section No. 8, in Blanshard the sum of 25*l.*, for the purpose of erecting and furnishing a school house in said section”—reciting that in compliance with the petition of the school trustees and others of school section No. 8 in Blanshard, to be taxed in the sum of 25*l.* for erecting and furnishing a school house in said section, it was enacted by the Warden and Municipal Council of the district of Huron, by virtue of the powers vested in them by Acts 4 & 5 Vic. ch. 10, 9 Vic. ch. 40, and 9 Vic. ch. 20, and by authority of the same, that the school section No. 8 in Blanshard be assessed in the sum of 25*l.* clear of the expense of collection, for the purpose of erecting and furnishing a school house in the said section.—Signed, William Chalk, Warden, H. D.

The clerk of the peace then proved that he forwarded a blank to the school trustees to fill in the names of persons liable to be rated in school section No. 8, township of Blanshard, and upon receiving it back, made out a collector's list, with the rate calculated on each person assessed by the assessment roll, and sent it to the trustees on the 6th

December, 1849, to be delivered to the collector, and that it was addressed to Styles as collector, but that no money ever came into his hands.

A printed form of collector's list was produced, in which was written :

| | | | |
|--|------------------|----|-----|
| Amount to be raised for school section No. 8, Township of Blanshard, for erecting and furnishing a school house in said section ; passed by the Huron District Council, February, 1849, by-law chap. 9.... | £25 | 0 | 0 |
| Assessor's fees, at five per cent.. | 1 | 5 | 0 |
| Collector's do. at do. do. | 1 | 5 | 0 |
| Clerk of the Peace, for collector's roll, &c..... | 1 | 10 | 0 |
| Balance due in fractions..... | 0 | 16 | 11½ |
| | <hr/> £29 16 11½ | | |

Also—Summary.

| | | | |
|---|------------------|---|----|
| Description of land, P. 1—1996, &c..... | £14 | 6 | 2½ |
| P. 2—1150, &c. | 8 | 2 | 8 |
| P. 3— 941, &c..... | 7 | 8 | 1 |
| | <hr/> £29 16 11½ | | |

[Also another schedule, in a printed form, headed, "Assessor's list for school section No. 8, in the township of Blanshard, in the Huron district, for the year 1849." Then follow the names of divers persons, opposite which are placed the lands, &c., for which assessed, and in the last column the amount to be collected.

| | | | |
|--------------------------------|------------------|---|----|
| 1st page..... | £14 | 6 | 2½ |
| 2nd " | 8 | 2 | 8 |
| 3rd " (<i>annexed</i>). | 7 | 8 | 1 |
| | <hr/> £29 16 11½ | | |

This is apparently the list returned by the trustees to the clerk of the peace, from which he made the collector's roll. It is signed by the trustees. No collector's roll was produced ; but the superintendent of schools for the township of Blanshard for the year 1850 was examined as a witness, and stated that he spoke to Styles, demanding the 25*l.* ; that Styles paid him 9*l.* 10*s.*, and being asked what he had done with the rest, said, that not expecting it to be called for so soon, he had spent it, and making some reserve as not collected, not exceeding one or two pounds. He said nothing about the roll.

The plaintiff being sworn denied having received the rate in question; that it was a county rate, but that he often permitted payments to be made to school trustees, whose receipts sufficed for him, and that he always allowed the collectors to retain their rolls.

The defendants' counsel referring to the statute 9 Vic. ch. 20, sec. 8 & 27, objected—

1st. That the moneys in question were not embraced in the bond or payable to the treasurer, but to the trustees.— See sec. 27, sub-secs. 2 & 4.

2nd. That the roll is not the roll meant by the statute—that is, the collector's roll.

3rd. That the roll was delivered too late.

| | |
|--|-----------------|
| The plaintiff claimed £25, and £4 16s. 11½d..... | £29 16 11½ |
| less £9 10s., and (say) £2..... | 11 10 0 |
| | <hr/> £18 6 11½ |

A verdict was then rendered for the plaintiff, with 1s. damages for detention of the debt, and damages assessed under the statute at 13l. 10s., (being 25l. less 9l. 10s. paid, and 2l. not collected), with leave to the plaintiff to move to add to the damages assessed, but the whole amount not to exceed 18l. 6s. 11½d., with interest thereon, and with leave to the defendant to move to enter a verdict for the defendants on 2nd issue, or plea of performance—depending upon the plaintiff's right to recover under this bond the moneys claimed in this action.

The *third* Monday in December, 1849, was the 17th.

In Easter Term last, *Becher*, for defendants, obtained a rule on the plaintiff to shew cause why the present verdict should not be set aside, and a verdict be entered for the defendants on the second issue, pursuant to the leave reserved, or a new trial be had between the parties—with or without costs—as being contrary to law and evidence.

Cameron, Q. C., shewed cause, and referred to statute 9 Vic. ch. 20, sec. 27, sub-sec. 4.

Becher, in support of the rule, said the bond of defendants was, that Styles should collect and pay over all taxes payable or due to the plaintiff which were placed on the

collector's room : that a supplementary roll (*a*) was put into Styles's hands too late to be executed ; that the amount of the last roll was not payable to the plaintiff as treasurer, being for the erection of a school house in a particular section ; moneys under the last roll were payable to the superintendent, or the school trustees (*b*) ; and that the sureties were not liable—the amount not entered on the collector's roll, and the supplementary roll delivered too late in December to be collected.

MCLEAN, J.— By the condition of the bond entered into by the defendants, the defendant Styles was bound to collect all the taxes due to the treasurer of the Huron district from the township of Blanshard for the year 1849, and to pay the same over to the plaintiff as treasurer.

After the passing of the by-law of the Municipal Council under the 27th section of the 9th Vic. chap. 20, sub-sec. No. 4, the clerk of the peace for the district of Huron made out a roll for the collector for the purpose of enabling him to collect the rate, and that roll was transmitted to the trustees of school section No. 8, to be placed in the hands of the collector to whom it was addressed, on the 6th December, 1849, and the collector had up to the 1st January, 1850, to collect the amount. It appears by the evidence that Styles, as collector, acted under the authority thus derived from the roll received from the clerk of the peace, and according to his own statement to the superintendent of schools for the township of Blanshard, collected the amount of the roll except a small amount, not exceeding 1*l.* or 2*l.* He paid over to the superintendent the sum of 9*l.* 10*s.* 0*d.*, which payment is sanctioned by the plaintiff ; but when asked for the residue of the amount collected, he stated that not expecting to be called upon so soon for it, he had spent it. The defendants' plea is, that Styles *as such collector* as aforesaid, did on the third Monday in December, in the year of our Lord 1849, pay over to the plaintiff as such treasurer, *all* the moneys collected and received by him as such collector, excepting his own lawful fees according to

(*a*) 9 Vic. ch. 20, secs. 8 & 10.

(*b*) 27th sec., sub-sec. 4.

the true intent and meaning of the condition of his bond ; but he now alleges that the amount collected in school section No. 8 under the by-law was not payable to the plaintiff as treasurer, and therefore that his bond does not apply to it.

It appears however clear to me, that all moneys collected for the erection of school houses under any by-law of the District Municipal Council were payable to the district treasurer, who was alone authorized to take security from collectors for the due payment of moneys collected for public purposes. By the 1st sub-section of sec. 27, 9 Vic. ch. 20, the secretary or treasurer of each school section was to receive all moneys collected by *rate bill*, or subscription amongst the inhabitants ; and by the 3rd section it is made the duty of trustees to acquire and hold for the corporation all personal property, moneys, or income, for common school purposes, and to apply the same according to the terms of acquiring or receiving them. Under this last section the trustees would be entitled to receive from the treasurer the amount of any rate imposed for common school purposes, whether for the erection of school houses, the payment of teachers, or any other object ; but they had nothing to do with the collectors of such moneys, and could give them no authority to collect, or any acquittance for any amount collected.

The defendants also allege that the roll under which the money was collected was not the roll of the collector according to the statute ; or, in other words, that the rate was not placed on the collector's roll by the clerk of the peace according to the authority of the 4th sub-section of section 27. It does not appear to me that this objection can avail a party who has made use of the roll as an authority, and collected moneys for school purposes, to screen him from paying it over to the party entitled to receive it, and to have it applied to its proper object. The amount collected could not be placed on a roll previously given out to the collector, but it was placed on another roll, which became the collector's roll for that specific purpose, and that was quite sufficient under the sub-section referred to, which says, that the

rate (that is a rate for the erection of any school house,) may be forthwith placed on the collector's rolls—shewing that the Legislature contemplated that collectors might have more than one roll; if it were not so, a collector might at any time defeat the carrying out of a by-law for a purpose similar to that in the present case, by withholding his roll from the clerk of the peace, so that he could not place the rate upon it; besides it could only be a rate upon a section of the whole township in this case, and there could be no necessity to have the roll of the whole township for the purpose of placing a sectional rate upon it.

As it appears that the defendant Styles has collected moneys which he has not paid over as collector of the township, and the plaintiff was clearly entitled to receive the amount, I think there is no ground for setting aside the verdict, and that plaintiff is entitled to recover the sum actually collected.

SULLIVAN, J., concurred.

Rule discharged.

NOTE.—*Macaulay, C.J.*; not having been present during the argument, gave no judgment.

WHITE V. CRAWFORD.

Misdirection.

Where the charge of the learned judge who tries a cause is calculated to make an impression on the jury prejudicial to a party, which the evidence and circumstances do not entirely warrant, the Court will grant a new trial without costs, on the ground of misdirection.

Assumpsit on the common counts. Plea, non assumpsit.

On the trial of this cause the principal witness for the plaintiff was one Jacob Shank, who swore that at the request of defendant he let one Hallock have some lumber: that Hallock came to him, and told him that he and defendant had bought plaintiff's lumber: that three or four days after this he saw defendant, who told him that he and Hallock had been at plaintiff's and had bought his lumber, and that when they tried to go to his (Shank's) mill, they could not get there because he had shut up the road: that on asking defendant how much lumber they had bought from plaintiff, defendant said about 300*l.* worth, but the witness understood him it had not been measured: that three months after the witness saw defendant and Hallock together at Hallock's house, and he then enquired whether

the defendant and Hallock were in partnership, and defendant said they were, but they did not wish people to know it. On cross-examination this witness, on whose testimony plaintiff's case wholly rested, stated that he sold Hallock some lumber; that he offered Crawford as security; that Hallock was worth nothing, and that defendant guaranteed the payment of Hallock's note to him: that Peter Brooks was present when he did so: that the admission of defendant that he and Hallock were partners was made about three months after he got plaintiff's lumber—in July, 1847,—and that Hallock and defendant's wives were present when the admission was made: that the witness sued the defendant on his guarantee for Hallock. The witness admits that he did enquire from Elijah Miller, a brother-in-law of Hallock, and asked him if he knew where Hallock was, as he wished to write to him to know whether he and defendant were partners. At first he said he did not know whether this was before or after the conversation at Hallock's, but subsequently he said that it was after Hallock went away: that the witness could not then prove the defendant's admission to him, and thought if he could get a letter from Hallock stating the fact it would be better. The witness also stated that he had told Mr. Burnham, plaintiff's attorney, of what defendant had said at Hallock's house as to his being a partner of Hallock, in answer to an enquiry of Mr. B., but that he had told no one before: that on hearing from defendant that he and Hallock were partners but they did not wish weople to know it, he had said he would not tell if he were asked.

George Hubbard, a witness for plaintiff, stated that he was employed by Hallock in 1847 to forward lumber from Oswego for him: that while engaged for Hallock, one Closson came to Oswego and attached the lumber, on which witness came to Hallock to inform him of the seizure, and he was then informed that the lumber was Crawford's under a bill of sale: that he and Hallock went to Crawford's, and there saw a bill of sale, executed in Crawford's favour in April preceding: the witness could not say whether any of the lumber seized was obtained

from White or not; the bill of sale was delivered to the witness, and the lumber was afterwards forwarded to Troy in Crawford's name, but the witness knew nothing about defendant till after the attachment.

Stephen Closson, at whose instance the lumber was attached at Oswego, proved that after he attached the lumber a compromise was entered into respecting it, but with whom he did not say: that he had been in Mr. Bell's office and had heard defendant speak of this matter, and, from what he said, that he concluded the defendant had an interest some way or other in the lumber.

On the defence Elijah Miller proved that a year after Hallock had gone away, he met plaintiff at the Upper Canada Bank; that plaintiff then asked him where Hallock was, and said that he wished to write to him—that Hallock had re-transferred the lumber to him when he was going away, and he was afraid he was going to loose on it—that Closson had seized it on the other side, and this had delayed its going to market, and he should loose \$1,000 or \$1,200 on it—that he had no other security but the lumber—that Shank, who was called as a witness for plaintiff and proved a purchase of timber from plaintiff and an acknowledgment of partnership, came to the witness after Hallock had gone away, and enquired where he was—that he wanted witness to write to know from Hallock whether he and defendant were in partnership, for if he was, that he could get his pay from defendant—that he had heard a report of their being partners but did not know how it was.

John B. Miller, on behalf of defendant, proved that plaintiff asked him Hallock's address; said he had not heard from the man the lumber was shipped to, and he wanted to hear from Hallock about it: he said nothing about defendant being a partner of Hallock's, or that he had sold the lumber to the defendant; the witness understood from plaintiff that he had sold to Hallock, but heard nothing said about a partnership; Shank told this witness that defendant was security for Hallock to him, but did not say that he was a partner.

The defendant being sworn, distinctly denied being a

partner or in any way connected in business with Hallock, further than in going security for him to Shank and 50*l.* to the Bank of Upper Canada: that he became security to Shank to oblige Hallock; and that he had to pay the Bank of Upper Canada the 50*l.* before Hallock left; and that he never received any of the proceeds of the lumber beyond the amount he had to pay the Bank: that he never did state at Hallock's, as sworn to by Shank, that he was a partner of Hallock, and that he did not know who had received the proceeds of the lumber from Troy.

Two of defendant's sons were sworn, and testified that they had never heard of the defendant being in partnership with Hallock.

The witness Hubbard, being recalled for plaintiff, stated that the lumber having been forwarded to Messrs. Grant, Freeman & Church of Troy, in the name of defendant, he subsequently gave authority to Hallock to receive the proceeds from them, but he was not aware who had received the proceeds.

On this evidence the learned Chief Justice told the jury that if they were satisfied the plaintiff sold lumber to Hallock, of which the evidence consisted chiefly of admissions (though that fact seemed not to be disputed), and were also satisfied of its value, still there could be no recovery against the defendant, unless they were satisfied from the evidence either that defendant made the purchase through Hallock upon an understanding between themselves, or was a partner with Hallock in the transaction: that the evidence was strong to lead to the belief that the defendant had contrived with Hallock to get quantities of lumber purchased here either for himself alone or jointly with Hallock in such a way as would leave him liable to no one, while he had taken measures to enable himself at any time to come in with his bill of sale and claim the whole: that his agreeing to go security to Shank for 100*l.* (which he endeavoured to get rid of by paying 50*l.*) seemed to form an insufficient reason for his taking a bill of sale which would cover all the lumber got and to be got, as if it was bought on his security, the fact being quite otherwise, as then sworn by defendant.

The jury gave a verdict for the plaintiff and 390*l.* damages. In Easter Term last, *Bell*, for defendant, obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, the verdict being contrary to law and evidence and the damages excessive, and for misdirection, and on grounds disclosed in affidavits and papers filed.

James Boulton shewed cause, and contended that it was proved that defendant and Hallock were partners in lumber sold by plaintiff to Hallock, and the plaintiff was therefore entitled to recover.

Bell, in reply, contended that there was nothing to show a general partnership at the time the plaintiff's timber was bought, or a partnership as to the particular lumber of the plaintiff's : that if they were partners, there was no reason why Hallock should not give a bill of sale to the defendant ; that there is nothing in the plaintiff's affidavits as to the delivery of any timber to Hallock.

McLEAN, J., delivered the judgment of the court.

The evidence appears to have made an impression on the mind of the learned Chief Justice unfavourable to the defendant, and the remarks made upon it, in charging the jury, could not fail to convey that impression to the jury, and to a certain extent, to prejudice the defendant's case. I confess I am unable to see anything in the evidence which could lead me to the belief that there had been any contrivance between the defendant and Hallock, such as that to which the learned Chief Justice refers.

The only evidence to establish a joint purchase from plaintiff by defendant and Hallock, is that of Shank, who had himself some difficulty with defendant in reference to a guarantee entered into by him for Hallock ; and the evidence of the defendant expressly contradicts that of Shank, while the evidence of the two Millers and his own cross-examination go very far to shake the credit of his examination in chief. He admits that he had enquired Hallock's address after he went away, in order to write to him "to ascertain whether he and defendant were in partnership, and that he could not then prove defendant's

admission to him, and he thought if he could get a letter from Hallock stating the fact, it would be better." Now, so far as this witness's own claim against defendant was concerned, there could have been no necessity for such inquiry, because he says that Peter Brooks was present when defendant became guarantee for Hallock's undertaking; and whether they were partners or not, defendant would be bound by his guarantee which could be proved by Brooks. Then, if Shank was making the enquiry for the plaintiff, it must have been equally unnecessary, as he could himself then have proved as well as on this trial, if the fact were so, the acknowledgment of the parties that they had bought plaintiff's timber, and that they were partners, though they did not wish people to know it. The desire expressed by the plaintiff, as well as by his witness Shank, to ascertain by correspondence with Hallock, whether he and defendant were partners, and the declaration of the plaintiff that Hallock had re-assigned the lumber to him before going away, appear to me to go far to establish that neither the plaintiff nor Shank, were aware of any partnership or connection between the defendant and Hallock in the purchase of the timber from plaintiff. The circumstance that the bill of sale given by Hallock to defendant, would cover all the timber, when defendant was only security to Shank and the Bank of Upper Canada, appears to have been regarded by the learned Chief Justice as indicating some fraudulent intention on the part of the defendant, when in fact the whole object of the defendant may have been to secure himself for the amount of the liabilities assumed by him. It does not appear that the defendant interfered in any way with the lumber; that any portion of it was delivered to him, or that he took any interest whatever in it. When the lumber was seized at Oswego, he gave the bill of sale to Hubbard, but does not appear to have personally put forward any claim, or to have interfered as the owner to get the lumber released; and for ought that appears Hallock and Hubbard, who was employed as his agent may have managed everything relating to the lumber and its being forwarded to Messrs. Grant, Freeman & Church,

in defendant's name. Subsequently, the defendant gave an order to Hallock to receive the whole proceeds of such lumber as had been forwarded to Troy in his name ; and, if defendant was interested as a partner, or as the claimant of the lumber under a bill of sale made, as seems to be imagined, to enable him to claim the whole, it is scarcely probable that he would have enabled Hallock, as a man of no property, to receive the whole of the proceeds.

But, admitting for the sake of argument, that the defendant's liability to the plaintiff for timber delivered to Hallock, was sufficiently established, I cannot discover any evidence to show what quantity of lumber was delivered by the plaintiff, or at what price ; the only evidence at all bearing on these points is, that of Shank, and all that he says is, that when he enquired what quantity of lumber had been bought from plaintiff, he was told about £300 worth, but he understood it had not been measured. Now, it seems rather too much to draw an inference from this, that lumber to the amount of £300 was actually delivered by plaintiff to Hallock. There is no evidence to show that a single board or plank was delivered to Hallock, though there is some evidence that about a certain value had been bought, which value had not been ascertained by measurement. Such evidence, I consider wholly insufficient to charge the defendant with the payment of a large sum of money, even if his liability for lumber sold by plaintiff to Hallock were otherwise established beyond a doubt.

There are affidavits filed on the part of defendants as well as of the plaintiff, but I do not find that the plaintiff has produced any account of lumber delivered, or shewn in any way the quantity or the price he was to receive for it. Without reference to the affidavits filed on the part of the defendant, it appears to me that it would be very unsatisfactory and unsafe to allow a verdict rendered for so large an amount on evidence of so imperfect a character to stand against this defendant ; and, as the charge of the learned Chief Justice seems to have been calculated to make an impression on the jury very prejudicial to the defendant, and such as it appears to me, the circumstances do not

entirely warrant, I think the new trial should be without costs, on the ground of mis-direction.

SULLIVAN, J., concurred.

NOTE.—*Macaulay*, C.J., not having been present during the argument, gave no judgment.

TRINITY TERM, 16 VIC.

Present MACAULAY, C. J.

“ McLEAN, J.

“ SULLIVAN, J.

GORE BANK v. HODGE.

Verdict for defendant—Evidence—Plaintiff entitled to admitted issues.

Defendant being the agent of plaintiffs, and having received large sums of money as such agent, on account of plaintiffs, and having deposited the same, mixed with his own and other persons' moneys in a safe in his office, which was broken into and the money stolen—a verdict having been rendered for defendant at Nisi Prius.

Held, per cur.—That there should be a new trial with costs, to abide the event, on the ground that it did not appear with sufficient certainty on the evidence, that there was a sufficient amount in the safe at the time of the robbery to satisfy the plaintiffs' claims; and, also, on the ground that the plaintiffs were entitled to nominal damages at all events, on the count for money lent, money paid, &c., to which there is no answer on the record.

Writ issued 26th March, 1852.

Declaration 3rd April, 1852.

Assumpit, £2000 for money lent, money paid, money received by defendant for the use of the plaintiffs, interest and an account stated; laid on the 20th day of March, 1852.

Pleas—12th April, 1852.

1st—That before and after the supposed cause of action in the declaration mentioned, accrued to the plaintiffs—to wit, from 1st January, 1845, to 1st September, 1851—defendant was agent of plaintiffs at St. Thomas, in and about receiving, having and paying the moneys of plaintiffs as their agent there, and with the knowledge and assent of the plaintiffs as such agent, at the office of the defendant there: and that, on the 10th April, 1851, he had in his said office, as such agent of the plaintiffs, the moneys in the declaration mentioned: and the same moneys, on the day and year last aforesaid, by some person or persons to defendant unknown,

were feloniously stolen, taken and carried away, from and out of the said office of the defendant; by means whereof, and from no other cause, and without any negligence, carelessness, or improper conduct, or want of due care in the defendant, the said moneys of plaintiffs were lost to the plaintiffs—Verification.

2nd plea—That before and after the supposed cause of action in the declaration mentioned, accrued to the plaintiffs—to wit, from 1st January, 1845, to 1st September, 1851—defendant was agent of the plaintiffs at St. Thomas, in and about receiving, having and paying the moneys of plaintiffs, and was accustomed to have and receive money, as the agent of the plaintiffs there; and with the knowledge and assent of the plaintiffs to have and keep the said moneys of plaintiffs, as such agent, in his office there; and that on the 10th April, 1851, he had in his said office, as such agent of the plaintiffs, the moneys in the declaration mentioned; and that on the night of the day last aforesaid some person or persons to defendant unknown, feloniously broke and entered the said office of defendant, and feloniously stole, took, and carried away the said moneys of plaintiffs, being the moneys in the declaration mentioned, then being in the office of defendant as such agent of plaintiffs; by means whereof and from no other cause, and without any carelessness, negligence, or improper conduct, or want of due care in the defendant, the said moneys of plaintiffs were wholly lost to the plaintiffs.—Verification.

Replications, 14th April, 1852.

1. To first plea—That defendant of his own wrong, and without the cause by him in the said first plea alleged, broke his said promise in the declaration mentioned, in manner and form as plaintiffs have in the said declaration alleged; concluding to the country and issue.

2. To second plea—*De injuria*, in similar terms, and issue.

In the particulars annexed to the replication, the plaintiffs claim £1487 11s. 11d., amount of moneys belonging to the plaintiffs in defendant's hands on the 10th April, 1851, and interest—relying on all the counts.

The case was tried before the Chief Justice of the Common Pleas, at the last assizes, holden at London, in and for the United Counties of Middlesex and Elgin.

The defendant's counsel claimed the right to begin, which was opposed by the plaintiffs' counsel, who was allowed to begin.

The plaintiffs' case in chief consisted in the production and proof by Mr. Stevens, the plaintiffs' cashier at Hamilton, of an account rendered by the defendant to the 10th of April, 1851, shewing a balance in the plaintiffs' favour of £1487 11s. 11d.

In support of the pleas, the defendant gave evidence to shew that formerly Mr. Hope and the defendant were agents of the plaintiffs at St. Thomas, but that upon Mr. Hope leaving that place, the defendant continued sole agent; his business as such being to receive payment of promissory notes due to the plaintiffs, and by them sent for collection, and to keep their notes in circulation; that the moneys belonging to the plaintiffs were kept in an iron lock-up safe, provided by the defendant, and kept in his office. Much evidence was given to shew that on the night of the 10th of April, 1851, a burglary had been committed in the house of the defendant, the safe been opened, and the principal contents stolen therefrom. It is not necessary to state such evidence at length, because at the close of the case, the plaintiffs' counsel admitted that that part of the defence was satisfactorily established, and rested the case on carelessness and negligence in the safe keeping of the money, the mixing of the plaintiffs' and defendant's own funds, and on the unsatisfactory nature of the evidence to prove that the sum in question was actually in the safe and stolen therefrom. He also claimed nominal damages, at all events, on the ground that the declaration was for £2000, the pleas to the whole declaration and the defence, only extended to £1487 11s. 11d. Upon the question of negligence, the learned Chief Justice expressed his opinion that it was not proved, and overruled the claim to nominal damages, on the ground suggested, but left the main question remaining to the jury—namely, whether they

£1000, all of which he might have received at once had he desired it; and that he also paid another person £36 10s. The account rendered does not mention the last sum, but charges the plaintiffs with £250 to Hodge & Co., on account Buchanan & Co., on the 10th of April next, after the £500 above mentioned.

The defendant could only shew the extent of the loss by making up from his books what sum ought to have been in hand, aided by his expression of belief that it was there.

In the course of his examination, he stated that he had private transactions of borrowing and lending, and of receiving and paying moneys, with various individuals, independent of the plaintiffs, and produced a rough balance sheet taken from his ledger of sums due by and to him—the former being £2120 8s. 4d., and the latter £2077 9s. 7d., leaving a balance against him of £42 18s. 9d., which he had in the first instance, retained from the £63 7s. 6d., left in the safe after the robbery, paying the plaintiffs only £20 8s. 9d., of that sum in the first instance, but afterwards allowing it a sum of £50 paid to them, the effect of which was to overpay it by £7 1s. 3d. He stated that various private debts of his had been paid or satisfied since the loss, upon some of which he was closely examined.

With respect to the confusion in mixing of funds, he said that he kept the cash mixed together; again, that in paying out moneys (alleged to be his own) in private transactions—*i. e.*, unconnected with the agency—he took the money out of the safe where all the moneys were; again, that he had not accommodation to keep the plaintiffs' funds and his own separate, that it was possible, but not done.

There was evidence in reply that, on the day after the alleged loss, the defendant had expressed his opinion that from £1000 to £1200 of the plaintiffs' money had been taken, and that several sums of money belonging to individuals, whom he mentioned, who had deposited the same with the defendant (not as agent of the plaintiffs) had been also taken; that he had asked questions respecting his liability to the plaintiffs and their liability to the persons who had made the deposits with defendant.

The defendant explained this, so far as he admitted the remarks imputed to him, (but denying some of them), by stating that it was mere conjecture, without previous reference to his books, and that when he afterwards examined them, he found the true state of the accounts and losses as he alleged at the trial.

Expressing doubts whether the way in which the defendant had kept the moneys, did not render him liable for the whole, none being kept separated as the plaintiffs' and distinct from his own funds, so as to preserve its identity, it was finally left to the jury on the question whether they were satisfied that the balance, claimed by the plaintiffs and admitted by the defendant, was in fact in the safe on the night of the 10th April, and if not, to find for the plaintiffs to whatever amount they were not thoroughly satisfied the money was there.

They found for the defendant.

During last term, *Becher*, counsel for the plaintiffs, obtained a rule to shew cause why said verdict should not be set aside without costs, on the grounds that it was contrary to law and evidence, and for misdirection, and for the reception of improper evidence, and that under the pleadings, the plaintiffs were entitled to nominal damages at all events.

John Wilson, for defendant, shewed cause in the same term, and contended—

1st. That the verdict was not contrary to law; that it all depended upon the fact of the loss of the money; that it was not proved to have been all mixed with defendant's funds, and if it was, that however it might render all the moneys so mixed the property of the plaintiffs, it did not deprive them of any, and that if the amount was there, it was enough: that as an agent, such as defendant was, he was a bailee of the moneys received, and only bound to take due care thereof, and not responsible for loss by theft.—*Story on Agency*, 149, 181, 187; *Jones's Reports*, 567.

2nd. That the verdict was not contrary to evidence, being fully warranted by the statements of the defendant, supported as it was by his books, accounts, and other evidence;

that what he stated the day after the loss, and before referring to his books, was mere conjecture, and susceptible of being corrected upon further and better information than mere memory; that the defendant lending and borrowing moneys, and carrying on independent private dealings, receiving moneys in deposit on his own private account, &c., were only circumstances for the consideration of the jury, in determining how far the defendant had shewn to their satisfaction that the amount due to the plaintiffs was really in the safe and stolen upon the night of the burglary.

3rd. That there was sufficient evidence of due care in the custody and keeping of the money, which was the question raised on the pleadings, not whether defendant had used due care and diligence in keeping his books and accounts, and therefore no misdirection on that head.

4th. That evidence was not improperly received; the ruling of the Chief Justice of the Common Pleas, as to the defendant's habits of care and watchfulness, &c., in locking up and securing his premises being admissible, and some evidence of general character for prudence, circumspection, &c., irrespective of his acts of vigilance, &c., not being ruled admissible.

5th. That the plaintiffs were not entitled to nominal damages, either on the ground taken at *Nisi Prius*—namely, excess of the amount laid in the declaration as compared with the amount proved; or that taken on moving this rule—namely, that the pleas are to the whole declaration, and yet are inapplicable to those portions of it which relate to moneys lent, paid, interest, and an account stated; and in short not to any, except money had and received, the amount of which ought to have been separately mentioned in the pleas setting up bailment and larceny as a defence; that the plaintiffs proved no damages, except for money had and received, and were not entitled to nominal damages upon each item of the demand in the declaration, in addition to what they proved, and that the defence met the case as proved by the defendant at the trial.

6th. That it was for the jury on the whole evidence to decide upon the facts, and whether the moneys of the

plaintiffs were stolen or not, as pleaded; that the issues involve both character and crime, irrespective of the question whether there was a burglary in reality, or whether it was merely simulated, knowingly and voluntarily permitted; that it involved the question whether the defendant had kept the plaintiffs' funds faithfully, or misapplied them; in short, whether he had been guilty of embezzlement; also whether he had been guilty of perjury or not, in affirming as a witness at the trial that the money was there; and that being virtually acquitted and exonerated by the verdict, on sufficient legal evidence, it was not a case in which a new trial should be granted, even if the verdict is not satisfactory, unless indeed upon some ground strictly of exception, in point of law.

MACAULAY, C. J.—This case presents the question, under what circumstances the loss of money by burglary and larceny, excuses the agent, and whether the pleadings and evidence support such a defence. With reference to these points it may be remarked, that a distinction is taken in the books between money and other personal property, owing to the impracticability of tracing current money like goods and chattels. Money is described as specie, or coin, and money of account, and when money is said to have no earmark, and therefore not to be distinguishable or traceable, specie or coin is meant which, having become current (*a*) or intermixed with other similar moneys, cannot be identified while in the hands of the agent, or receiver, or be traced in the possession of others to whom it may have been transferred—as, for example, after having been mixed up with his own funds of a like description, or being paid into his banker's to his own credit. In such events the money originally received, is looked upon as changed in point of property, and converted into money of account, the agent's character of a (*quasi*) bailee ceases, and he becomes either liable in trover, or indebted to his principal for such a sum of money generally. The distinction is important to be observed between coins, bank notes, and other current money, that can be identified in specie in the agent's hands,

or in other hands, or traced to other property into which he may have transferred or changed them; and money as a mere debt for money had and received, and for which he is liable to account; so also between moneys upon the receipt of which the law implies a promise to pay upon request, by reason of the receiver's duty to pay the same immediately without any special request (a), and moneys received for special purposes, or to be dealt with in the prosecution of a special agency, and to be retained until so applied, or until payment or an account thereof should be demanded, in which event the contract or understanding being of a special nature, and the promise express, no duty would arise to pay forthwith without request; no promise to pay on request, would be applied by law, and a special request would become necessary to convert the relation of principal and agent into that of debtor and creditor. The distinction is further to be observed between pecuniary transactions in which the agent receives coin or current money, and those in which the money is received in account, through the medium of bills of exchange, &c. For the former, he may be liable to account in specie, or only as for money of account according to circumstances; for the latter, he can only become liable for money of account. So the nature of the different remedies at law for the recovery of moneys received by an agent for his principal are important to be noticed—as detinue, trover, account, and debt or assumpsit—also (in reference to such remedies), the pleas that may be applicable and which are to be distinguished as pleas in denial, in excuse or in discharge, and among others, plea of the Statute of Limitations, and of tender post diem, in cases of simple contract or actions for simple money demands, and the principles on which they rest, inasmuch as they afford tests more or less available in determining the manner and form in which the loss of money by robbery or theft should be pleaded, and whether at the time of such loss, such money was the property and at the risk of the principal or of the agent.

(a) 11 M. & W. 233.

In detinue some specific article of personal property is demanded, and it may be brought for money in specie when the specific coin or bank notes, &c., can be particularized and described in the declaration, but not otherwise, and it is manifestly inapplicable to a demand for mere money of account.

In trover, the specific property, whether goods and chattels, or coin, &c., must be stated in the declaration, and is treated as wrongfully converted, and the action is for damages as a compensation.

Account, debt, and assumpsit, are appropriate remedies, not for the recovery of the specific money, but for money had and received generally, embracing money of account as well as moneys received in specie, and are therefore more comprehensive remedies than detinue or trover.

Like trover, they admit the property in the money received to be changed, or to belong to the agent, and seek only the sum or amount in damages, and which may be paid in any current money of equivalent value that can be legally tendered. In *Jackson v. Anderson*, 4 Taunt. 24; and *Osten v. Butter*, 5 B. & A. 652; and D. & K. 282—the distinction between trover for specific coins, &c., and assumpsit for money had and received is shewn.

In ordinary agency transactions the agent is looked upon as only liable to account for what I call money of account, as distinguished from any specific coins or other current money he may have actually received; he is not expected to pay over the identical money, but becomes indebted in a sum equal to the amount; but it is otherwise in the case of servants, clerks, and others, who, by fraudulently misapplying the moneys received, may be guilty of embezzlement, &c., and there may be special agencies wherein the agent receives the moneys from or for the principal, to hold in the nature of a bailee until applied to the special objects or purposes for which it was entrusted to him. In such transactions he is not at liberty to treat the specific money as his own, but should keep it, subject to the order of the owner, or dispose of it only in accordance with the authority specially given to him; and it is his duty to be at

all times prepared to pay it over upon demand, in the absence of any specific appropriation or peculiar duty or direction in relation thereto. One test, whether the property in money was in the principal or agent, may be by the agent's liability to pay interest on the amount as a debt due by him (*a*).

Pleas of the Statute of Limitations and of tender after the day are not properly in denial, excuse, or discharge; the first is a bar by statute, and the last is said to be an anomaly, confessing as both do the cause of action, and yet not technically avoiding it; there is this peculiarity too, that a tender may be made although the Statute of Limitations is running, as upon promises implied upon executed considerations, &c., to pay the money upon request: the statute runs from the time the debt, duty, or promise to pay, accrues, but a tender is admissible at any time before an actual request made expressly or impliedly by law, in the bringing of actions—*Poole v. Tumbridge*, 2 M. & W. 223; though not after a positive request, express or implied. Further, the Statute of Limitations, when the time has expired, bars the actions, but the plea tender of *post diem* is only in bar of damages *ultra* the sum tendered: which sum is with the plea, brought or paid into court for the plaintiff's use.—*Poole v. Tumbridge*, 2 M. & W. 223.

When the promise to pay upon request is implied by law (as upon executed considerations, &c.) no other promise can be substituted or superadded, and no special request is necessary, the bringing of the action being a sufficient request in law; but when the promise is special none can be implied, and it forms part of the contract, as when the party undertakes to pay only upon demand, or to pay a collateral sum on request, &c. There a special request must precede the action; the demand and default thereupon, and not the promise, creates the debt, and a perfect right of action does not vest until such demand be made.

When a debt is due and payable, and there has been a default or a breach of the promise to pay, whether express

(*a*) Stat. 7 Wm. IV., ch. 3, secs. 10, 20; *Walker v. Constable*, 1 B. & P. 306; *Debernales v. Fuller*, 2 Cam. 426; *Hicks v. Mareco*, 5 C. & P. 498; *Fruhling v. Schroeder*, 2 Bing N. S. 77.

or implied, a vested right of action accrues, and pleas of subsequent matter of defence are in discharge; when there has been no promise or contract or no breach thereof, the pleas may be in denial generally or partially, as in denial of a special request when it appears necessary on the face of the declaration or is averred; or they may be of affirmative matter as performance, &c., or in excuse of non-performance.

As to the circumstances under which robbery, burglary, or larceny, constitute a defence, it will, I think, depend upon the consideration whether the agent was a bailee of the money, holding and keeping it in specie for the principal as his *property*, or was merely indebted for so much money had and received, and for which detinue or trover would not lie, but only account debt or assumpsit.—*Jackson v. Anderson*, 4 Taunt. 24; *Storey on Bailments*, secs. 25, 26, 28, 37, 39; 1 Roll. Ab. 124, pl. N. 15; Co. Lit. 89; 4 Co. 84; *Southcote's case*, Cro. El. 815; *Morly v. Morly*, 2 Ch. Ca. 2; *Woodliffes' case*, Moor. 462; and ib. 96, 394; *Coggs v. Bernard*, 2 Ld. Raymond, 916; *Buckmyr v. Darnell*, ib. 1087; 2 Lev. 2; 2 Keb. 761, 779; 830; *Vire v. Smith*, 1 Vent. 121; *Parkins v. Woolaston*, 6 Mod. 139; *Miller v. Race*, 1 Bur. 452; *Jones v. Lewis*, 2 Vez. & Sr. 266; *Rock v. Hart*, 11 Vez. 61; *Wren v. Kenton* ib. 382; *Finucame v. Small*, 1 Esp. N. P. C. 315; *Clark v. Earnshaw*, Gow. 30; *Nelson v. McIntosh*, 3 Star. 237; *Adams v. Longman*, 2 A. & E. 256; *White v. Stump*, 4 N. & M. 470; *Chitty Jr. Forms*, p. 218; *Rob. Entries*, 23. 124 *Forms of Pleas*; 1 Vin. Ab., Account N. 15, C. 3; 2 Vin. Ab., Action on the Case, M. C. (2); Vin. Ab. Money A. B.; Bro. Accompt., pl. 69; Com. Dig. Accompt. A. 4, E. 6, No. 10. The rule of law is well expressed by Lord Ellenborough in *Williams v. Everett*, 14 East. 593, where he says, that in all cases of *specific property* lost in the hands of an agent, when the agent is not himself responsible for the *cause* of the loss, the *liability to bear* the loss is the *test* and the consequence of being *proprietor* as the principal of such an agent.—And see *Bartlett v. Dimond*, 14 M. & W. 52.

It also further material to such defence, that the money received should be kept separate and unmixed with other

similar moneys that might destroy its identity, for if a bailee or agent wrongfully converts or disposes of money to his own use, or so mingles it with his own funds that it cannot be separated and distinguished, it is at his risk, in case of a loss by theft, fire, or otherwise; that will amount to such a bailment or custody of the money in specie, as the property of the principal, as will render the risk his, or what to such a confusion of the funds as to shift it upon the agent, must of course always depend upon the circumstances of the case under the pleadings and issues joined and the facts proved in evidence at the trial.—*Vin. Ab. Property*, E. 5 (4), 6 (4), 7, 8; *Douglass v. Kendall*, 1 Bul. 95; 2 Bul. 322; *Cro. Ja.* 204, 366; *Hill v. Hawkes*, 1 Roll. Rep. 1; *S. C. ib.* 45; *Colwill v. Reeves*, 2 Camp. 576; 2 Bl. Com. 405, S. 7; 2 *Stephens' Com.* 85; *Cow.* 197, 200; 2 *S. & J.* 33; 2 *Kent's Com.* 297; *Howard v. Jemmet*, 3 Bur. 1369; *Cornforth v. Rivett*, 2 M. & S. 510; *Thompson v. Giles*, 2 B. & C. 426; *Rex v. Egginton*, 1 T. R. 370; 15 *Vez.* 436, 439, 440, 442; 11 *Vez.* 60, 61; *Pott v. Clegg*, 16 M. & W. 321; 1 *Phil.* 399; *Foley v. Hill*, 2 House of Lords's cases, 28; 11 *Bevan* 546; *Watts v. Christie*, 13 Ju. 345; 1 *Mer.* 541, 568; *Sims v. Bond*, 5 B. & Adol. 389. In *Robinson v. Ward*, 2 C. & P. 59; *S. C.* 1 R. & M. 274, *Abbott, C. J.*, said: "If a person having the money mixes it with his own, he thereby makes himself personally debtor to the estate; it would be no longer ear marked."

In *Wren v. Kinton*, 11 *Vez.* 377, 382, *Lord Eldon* said: "If this person so dealt with the money received by him in trust that if solvency (of his banker) continued, the property was to be of his own, but if insolvency happened part of the account was to be that of the trust estate, and the dealing was such that until the account was taken in a court of equity it could not be ascertained how much belonged to him and how much to the trust estate, it would be most dangerous to hold that the loss should fall upon the trust estate." In *Taylor v. Plumer*, 3 M. & S. 574, 575, *Lord Ellenborough, C. J.*, after remarking that any abuse of trust could confer no right on the agent, observed that the right of the principal only ceased when the means of ascertain-

ment failed, which was the case when the subject was turned into money, and mixed and confounded in a general mass of the same description; that the difficulty which arises in such a case is a difficulty of fact and not of law; and the dictum that money has no ear mark must be understood in the same way—that is, as predicted only of an undivided and undistinguishable mass of current money.—See also 1 Ruse 242, 243; Pease v. Baldwin, 19 Vez. 25.

It has been already observed that money received by an agent may be payable to his principal forthwith (when the law raises the promise to pay it upon request), or to be kept in hand, subject to order and until demanded specially. In both cases where the money received is in coin or specie, it is ostensibly the property of the principal and the duty of the agent in strictness is to pay the same money; and so long as the promise to pay *that* money is susceptible of performance and remains unbroken the loss thereof by robbery, &c., seems a valid defence before auditors taking the accounts in actions of account, or by plea and as evidence before a jury in actions of debt or assumpsit for money had and received. It appears to me that a plea shewing the money lost to be the property of the principal, and held by the agent upon a special understanding that payment was to be demanded, and that before any demand it was stolen, without negligence, &c., would be good in substance in an action for money had and received, was possibly objectionable as being an informal or argumentative denial of the debt or cause of action or of the general request laid in the declaration or as amounting to a denial of a special request of it, appeared necessary and was averred therein; or if it did not appear, but was shewn by plea to be necessary, or as pleading the loss of specific moneys, without describing or enumerating them, in answer to a declaration for money had and received generally.

Also that by analogy, the pleas of tender after the debt had become due and payable, a plea admitting the indebtedness or right of action technically and so far as respected the running of the Statute of Limitations, yet alleging a

constant readiness to pay upon request, &c., would be a valid defence, if the plea alleged the money received and the money lost to be identical, and that there had been no actual default such as would have precluded the right to tender the amount due *post diem*, but not if a previous request and non-payment thereupon could be with truth replied, as might be replied to such pleas of tender. In any event however the money received must have been preserved unconfused with other similar moneys, and the money stolen must have been the same; in other words, must have been and continued to be the separate property of the principal. If the agent disposed of the money received or without authority substituted other funds or confused it with a mass of similar money so that it could no longer be traced or distinguished; in short, if he so dealt with the money as to destroy its identity, and had thereby put it out of his power to perform his promise to pay, strictly and in specie, a conversion of the money might be imputed to him, the relation of debtor and creditor, as distinguished from that of principal and agent, recor or bailee, would arise (if it did not exist before) and the risk of future loss would be his.—*Davayre v. Noble*, 1 Mer. 541; *Cornforth v. Rivett*, 2 M. & S. 510; 2 Y. & J. 33; *Thompson v. Giles*, 2 B. & C. 426; *Pott v. Clegg*, 16 M. & W. 321.

A plea merely shewing that the defendant being indebted to the plaintiff for money had and received whether payable forthwith or upon special request, always kept a sum in hand sufficient to pay him in the event of a demand, and that before any demand the money so reserved had been stolen or otherwise lost or destroyed, without negligence, &c., would not amount to a defence in law, if it did not also appear that the money received and the money stolen or lost was identical, or that the plaintiff had acquiesced in that mode of dealing by which any other funds might be substituted for the moneys received, so that although not the same money, it was nevertheless the plaintiff's property, and held and dedicated to his use accordingly up to and at the time of the alleged loss. To throw the risk and loss upon the plaintiff or principal, the money should

be kept not only with due care, but separate and distinguishable so that detinue or trover might have been maintained therefor, if wrongfully withheld or converted. If the nature of the dealings or transactions between the parties merely involved and amounted to matters of account, not for specific coins or moneys in specie, but only for the sum or amount in gross, the loss by theft of funds sufficient to cover the balance due, not being the same moneys would fail as a defence because in such case the funds in hand would be the agent's property; they would go to his executors as assets of his estate, would be liable to his creditors and subject to the satisfaction of his debts, all of which would be quite inconsistent with the right of property reposing in the principal and kept distinct for his use, without which the money would not be at his risk.—Clarke v. Shee et al., Com. 197, 200; note to Howard v. Jemmett, 3 Bur. 1369; Rex v. Egginton, 1 T. R. 370.

This case is first to be considered with reference to the pleadings.

The declaration consists of one general count for 2000*l.* money lent, paid, had and received, interest, and an account stated; the day being laid on the 20th March, 1852.—2 Sand. 117, 8, (2) & (E); *ib.* 121, (E) 122 (2) & (B); McGregor v. Graves, 3 Ex. R. 34.

The pleas are to the whole action and are inconsistent with the declaration as respects time.

They state that before and after the supposed causes of action accrued—to wit, from the 1st January, 1845, to the 1st September, 1851—the defendant was agent of the plaintiffs, &c., the last mentioned day being long before the cause of action is alleged to have accrued. They then allege that on the the 10th of April, 1851, (a period long prior to the time stated in the declaration, the moneys therein mentioned were in the defendant's possession and stolen from him, &c., and yet the pleas are pleaded in bar of the causes of action, and which causes of action they profess to confess and avoid.

However treating time as immaterial, they are bad as being to the whole declaration, and clearly inapplicable to

the money lent, the interest, and the account stated; and, if restricted to the money had and received, they do not specify to what portion of the plaintiffs' whole demand they are intended to be pleaded. But beyond this they are bad in substance. They are as framed pleas in *discharge*, and not in denial or excuse, and the cases in actions of account shew that loss by robbery or theft is not pleadable in bar of the action of account, but only before auditors in discharge and as in law constituting an accounting.—See cases referred to, ante.

The declaration is for money had and received generally, and imports a promise to account therefor and to pay the same upon request implied by law, and the action is a sufficient request. For such a demand neither detinue nor trover would lie but only account debt or assumpsit.—4 Taunt. 24; 5 B. & A. 652, ante. The pleas, however, import that the defendant was more than a mere debtor for money had and received to the plaintiffs' use, and set up a special agency or bailment of specific moneys not described, and seek to bar the plaintiffs' action for *damages* by alleging the the possession of the money and its loss by burglary *after* the cause of action had accrued, without averring that it was the identical money received, or that he was always from the time of its receipt until such loss, ready to account and pay it upon request, or that it was so lost before any request—11 M. & W. 233; but impliedly admitting a request and default, and not even argumentatively denying them. Theft is not a good plea in bar or discharge of a vested right of action for the money, however valid when correctly pleaded in *excuse*, and the plea shews that the defendant was always ready or had not made default as that the money was to be retained or kept till demanded and was stolen before any request was made. The form in Chitty jur. p. 218, No. 5, is adapted to such a state of things. (See it extracted separate p. 22.) A comparison of the present pleas therewith will shew the distinction I have mentioned. *In trover* it would be no defence to plead that after the conversion the goods were stolen, and though a demand and refusal would not amount to more

than evidence of a conversion and not to an actual conversion in law, they would create a vested right of action for a demand in money where a request was a condition of the contract or specially required to be made, and I am of opinion that a loss by larceny subsequent to a demand and refusal would not amount to a valid defence in such cases. In a plea of tender after the day for payment has passed a previous request is not denied, but a constant readiness must be alleged, to shew that the defendant was always ready to pay, and a request and non-payment thereupon *before* or *after* the alleged tender may be replied in answer to the plea. In *Kingston v. Kingston*, 11 M. & W. 233 the plea was deemed bad for not denying a previous request or averring a constant readiness to pay. I not only consider the plea bad but the replication also exceptionable, because the pleas are in discharge and not in excuse.

I find no authority for the plaintiffs' right to a verdict for nominal damages, as contended by Mr. *Becher*. Regarding the pleas as merely pleaded to the money had and received, it is sufficient for the defendant to account for all the moneys which the plaintiffs proved him to have received, though less than the full sum of 2000*l.* laid in the declaration.

The plaintiffs were allowed to begin at the trial, for the very purpose of establishing the amount and nature of their demand, although the affirmation of the issues was upon the defendant. There is no judgment by *nil dicit* as to any part of the declaration, nor any *venire* to assess any damages absolutely or contingently; and the jury could not find all the issues for the defendant and still assess damages against him, without something in the record to authorize and require it. According to the argument of the plaintiffs' counsel, the plaintiffs would be entitled to a verdict on the issues found with nominal damages, had the defendant begun and failed to prove the full sum of 2000*l.* stolen, although the plaintiff proved nothing. Damages could only be assessed, as the pleadings are in anticipation of judgment *non obstante*. It does not appear that the plaintiffs could have signed judgment by *nil dicit* as to any part of

the declaration, notwithstanding they might have demurred to the pleas as professing to answer the whole declaration and yet failing to do it. Nor does the action seem discontinued by the plaintiffs replying, instead of demurring, to such pleas.

If judgment by *nil dicit* could not be given before the trial—and it is by no means clear that it could—I do not see how a judgment *non obstante* can be given after it. All judgments are in form and effect acts of the court. I do not say judgment *non obstante* could not be given as the case stands; no such judgment has been moved, nor has judgment by *nil dicit* been entered, and the questions are not before us.

If there was no other objection to the verdict it might be material to consider carefully the state of the record, and whether a repleader should not be awarded, although repleaders are properly where the issues joined are immaterial, and the court cannot tell for which party to give judgment. The verdict will however be set aside on other grounds, and the pleadings may be amended, if desired, before another trial.

Passing then from the pleadings to the evidence, the substantial questions are, whether burglary or larceny can be pleaded in bar of an action for money had and received either in excuse of the alleged breach of promise to pay or in discharge of damages by reason of the non-payment; and, if so, whether the facts proved support such a defence.

It appeared in evidence that the plaintiffs were bankers at the city of Hamilton, are authorized by statute to issue their own promissory notes, payable on demand, as a circulating medium, such bank notes passing current as money. That the defendant was their agent at St. Thomas, and received their promissory notes, in common with other moneys, as such agent, from them or for their use, to be by him applied to the special purposes and objects of such agency in the plaintiffs' business of bankers.

It was not his duty, under this arrangement, to pay over the moneys as fast as recovered, but the understanding or

agreement was that he should keep them subject to the plaintiffs' order, or until payment thereof was requested. The promise to pay was therefore an express or special one and conditional, and not one implied by law to pay upon request in the sense of that implication. It also appeared that the defendant carried on other and more extensive pecuniary transactions of his own, and that for several years he had been in the habit of mixing together promiscuously all the moneys that came into his hands in the course of his own business and of his agency, whether bank notes of the plaintiffs' bank or of other banks, or specie in gold or silver coins, and of making payments from time to time, both on the plaintiffs' account and on his own, out of the same mass of funds, but always retaining and having in hand (as alleged by him) a sum sufficient to meet the balance due the plaintiffs'. It likewise appeared that in the course of his own personal business he became, and at the time of the alleged loss was, indebted to various persons besides the plaintiffs, for moneys received to their use, amounting to 2120*l.* 8*s.* 4*d.*: that holding himself liable to those creditors, and denying that any material portion of the moneys stolen had been received from or belonged to them, he represented that divers other persons were indebted to him for moneys by them received from him, or to his use, and for which they remained accountable to him, to the amount of 2077*l.* 9*s.* 7*d.*, and in this way he explained how he had disposed of so much of the moneys due by him to his other creditors, and the resources he relied upon for paying them.

The difference between the above sums, being 42*l.* 18*s.* 9*d.*, he claimed to be entitled to deduct out of the 63*l.* 7*s.* 6*d.* found in the iron safe on the morning of the 11th April, 1851, as being his own. In this way he balanced his books and accounts, and represented that the large sum due the plaintiffs was in the safe, dedicated to their use, on the 10th April, that the moneys therein were their property, and were stolen on the night of the 10th April, and the loss theirs.

Of the 63*l.* 7*s.* 6*d.* which remained, I did not understand

that the defendant could identify any specific sum of 10*l.* 8*s.* 9*d.* as belonging to the plaintiffs. So far therefore the funds were evidently confused in an undistinguishable mass, although the amount has since been paid to the plaintiffs. How far the like confusion pervaded the whole mass at the time of the larceny was not clearly explained. It is my present impression that if the moneys stolen were the remains of an undistinguishable mass, composed of both the plaintiffs' and defendant's fund, and not a sum kept apart as theirs, and capable of being distinguished from the residue, the moneys were at the defendant's risk, and the loss was his: that, to render the plaintiff's liable to sustain it, it should appear that the money stolen was (to some definite extent at least) a portion of that specifically received and held for them; and not only so, but that it remained separate, or (if mixed) that it was at all events so far ear-marked as to be capable of separate identification, so that had the plaintiffs claimed it as being theirs before the loss or in the event of the defendant's death or insolvency, or of executions issuing against his moneys, or the like, it could have been distinguished by him, or as against his creditors or representatives, as being the plaintiffs' money and *property*.

The case was not left to the jury in this point of view; wherefore, if the pleas were good and the defence set up at the trial admissible under them, it still remains a question whether any moneys, the *property* of the plaintiffs and at their risk, were stolen. That might be tested by enquiring whether the money lost was at the time in that state that plaintiffs might have maintained detinue or trover for that specific money as their property; whether the thief, if detected, could be indicted and convicted of stealing their money; whether, upon conviction, they would be entitled to restitution; whether the defendant would have incurred any criminal responsibility by wrongfully or fraudulently misapplying or disposing of it; whether the money could have been attached or levied upon by his other creditors; whether it would have gone to the assignees under a bankrupt law like that of England or formerly of Upper Canada;

whether, had he died, it would have gone to and constituted assets in the hands of his executors or administrators. The answers would depend upon the legal right of property and its separate identity. Whether the bailment continued or had been determined by any wrongful or unauthorized act of the defendant, in mixing the moneys and destroying their identity, and thereby rendering himself liable for the amount in an action for money had and received, lost or not lost.—*Wright v. Hunter*, 1 East. 30; 12 Mad. 602 Am. Case 997; *Burdett v. Willet*, 2 Vernon 638; *Ex parte Sayers*, 5 Ver. 172, 3; *Rex v. Egginton*, 1 T. R. 369; *Locke v. Hollingworth*, 5 T. R. 227; note to *Howard v. Jemmett*, 3 Burr. 1369; *Paley on Agency*, 79, 86, 7, 8, and note.

Considering the relation in which the defendant stood towards the plaintiffs and the footing upon which the business was conducted, I think he was a special agent and in the nature of a bailee of their moneys, to hold the same for the purposes of his agency until drawn for or demanded by the plaintiffs, but that it was his duty to be always ready to pay the same upon request, by draft or otherwise: that it was also his duty to keep their moneys separate and distinguishable from his own funds, as the specification of the funds in hand at the end of the monthly accounts rendered by him to the plaintiffs imported that he did, and that so long as things remained in that state the moneys were at the plaintiff's risk. But, on the other hand, that in mingling their funds with others, he did so at his own peril, and that one test whether the money stolen was at his risk or the plaintiffs' would be to ascertain whether he had previously done any wrongful or unauthorized act with the moneys received for the plaintiffs (by intermixing or otherwise) amounting to a conversion thereof in law, and for which the plaintiffs might have elected to bring trover. How the facts in relation to such a point may appear at another trial, I do not anticipate.

I may however add that if it turned upon the question principally dwelt upon by me at the trial—namely, whether in point of fact (regardless of identity) a sum of money

equal to that alleged to have been lost to the plaintiffs was in the safe to be stolen on the night of the 10th April, 1851—I should have been disposed to grant a new trial, in terms, because depending, as it mainly did, upon the defendant's own statements as a witness in his own behalf, and rested upon computation and balancing books of accounts after the burglary, rather than upon personal or positive knowledge of the amount and state of the specie or funds in the safe, corroborated or confirmed by the way in which the account and moneys had been kept and dealt with throughout, I do not consider that the defendant's explanations, and the way in which he conducted his agency and managed the moneys entrusted to him, were such as to carry conviction or satisfactorily to lead to the conclusions it was their object to establish, and to which the jury came. I cannot say that I consider the way he accounted for the balance confessedly due to the plaintiffs such an accounting as the court or the plaintiffs ought to be satisfied with, without another investigation and submitting the case to another jury.—*Attorney General v. Rogers*, 11 M. & W. 670; *Hall et al. v. Poyser*, 13 M. & W. 600; *Mellin v. Taylor*, 3 Bing. N. S. 109; *Toulmin v. Hedley*, 2 C. & K. 157.

With respect to the evidence of due care in the way in which the moneys were kept in the defendant's custody, supposing them to have been in the safe, and irrespective of the confusion of the funds, I continue to take the same views that I expressed at *Nisi Prius*, both in relation to the defendant's general habits of circumspection and the way in which the moneys were secured.

I think, even had there been no valid objection to the way the case was left to the jury, I would not have considered it a sufficient argument against setting aside the verdict that it will re-open implied charges of dishonesty, affecting the character of the defendant, of which he has been acquitted, or upon his veracity to imputations from which he has been virtually exonerated. He is not in this action charged with embezzlement, or any indictable offence, nor do the facts of the case seem to involve him in such

charges. Nor will a verdict against him implicate him in perjury. Being admitted as a witness in his own behalf, his evidence, like that of any other witness, is subject to review, and a verdict not in accordance with the evidence of a party to the cause, although it may shew that such evidence failed to satisfy the jury of the facts stated, it does not shew that they believed he had sworn deliberately to what he knew to be false. Therefore, for the reasons above mentioned, I think there should be a new trial, with costs to abide the event; because, although the verdict is set aside virtually for misdirection on my part, still (although the point was mentioned at *Nisi Prius*) I was not requested to leave the case to the jury as turning upon that point, or to take third opinions upon it, and had it been desired it is probable I should have asked the opinion of the jury thereupon, although I doubt not that I should nevertheless have left the case to the jury in the terms I did as respected the result of the verdict.

McLEAN, J.—I have looked carefully over the evidence given on the trial, and independently of any doubt which may arise as to a robbery of the money having been actually committed, the evidence is very far from being clear or satisfactory that the money was in fact in the defendant's safe at the time of the alleged robbery; besides which, from the defendant's own testimony, it appears that his course of dealing with the moneys of the plaintiffs in mixing them with his own and those of other persons, and using the whole without distinction for his own purposes makes it almost impossible to shew that the moneys stolen were those of plaintiffs and not those of the defendant, or of other parties who had deposited such moneys in his hands for specific objects. It is obvious from the defendant's statement on oath, that the moneys of plaintiffs could not be distinguished from those of defendant, so that the plaintiffs might be able to claim them in the event of the death of the defendant, or in the event of any other contingency which might render it necessary for the plaintiffs to resume or obtain the possession of their moneys. The case seems to have gone to the jury as if the defendant

could not be held liable if there were sufficient means in his safe at the time of the alleged robbery to meet the plaintiffs' demand for the moneys which he ought to have in his hands as their agent. Now if these moneys could not by any means be distinguished as the moneys of the plaintiffs, I cannot see on what principle they can be called upon to sustain the loss. It should, I think, have been left to the jury to say whether by mixing up the plaintiffs' moneys with his own, and using any portion that first came to hand for his own purposes as occasion required, he had not so dealt with it as to have converted it to his own use, and to render himself liable for its loss ; it does not follow that because there was enough in the defendant's safe to meet the plaintiffs' demand, that the whole of that amount must be regarded as the plaintiffs', and that they must necessarily bear the whole loss. The principal points to which the attention of the jury was directed, were—1st, Whether there had been a robbery ; and 2nd, if there had, whether there was in fact a sufficient amount in the safe at the time of such robbery to satisfy the plaintiffs ; and upon these grounds the verdict of the jury for the defendant seems to have been rendered. The principal point, whether the defendant had not by this mode of dealing with the plaintiffs' money been guilty of such a wrongful conversion of it as would compel him to bear the loss, appears not to have been submitted to the jury, or urged upon the attention of the learned Chief Justice at the trial, by the counsel. It appears to me that justice requires, that where a large amount is in controversy—the case having gone to the jury under an erroneous impression as to the extent of defendant's liability—it should be submitted to another jury for decision, when the facts and circumstances may be brought before them more clearly than on the last occasion.

The plaintiffs allege that under any circumstances they were entitled to nominal damages on those parts of their declaration for money lent, money paid, interest, and account stated—to which there is no answer on the record ; and, as this was urged at the trial, and has been made a ground of moving against the verdict on that account, even if no other ground existed, the verdict should be set aside.

SULLIVAN, J.—There can be no doubt in this case but that the defendant's pleas must have been held bad upon demurrer, either special or general in the first place, because they are pleas of loss by larceny or burglary, of money of the plaintiffs in [the hands of the defendant, as agent of the plaintiffs, pleaded to a count for money paid by the plaintiffs to the defendant's use ; for money lent by the plaintiffs to the defendant, and for money found to be due upon an account stated, as well as for money had and received by the defendant to the plaintiffs' use. To the latter part of the count could the plea alone be an answer ; for if the plaintiffs lent the defendant money, or paid money to the defendant's use, or if an account was stated and settled between them, in which the defendant was found to be indebted ; in short, in any case, where a cause of action had once arisen, the money which was the original subject of the action having been in the defendant's possession, and its having been lost, could be no defence.

The pleas would have been held bad on demurrer also, because they do not state that the larceny or robbery of the money from the defendant's custody was before the cause of action accrued ; that is to say, while the defendant was holding the money in performance of a duty to the plaintiffs. The pleas cannot be good in discharge of a cause of action already accrued. If pleaded properly, they would be good as excuses for not paying over the money—the time not having come for paying it over when the alleged larceny was committed. After verdict, however, the pleas would possibly not be held bad on the ground I have last mentioned, for they do not in terms state that the robbery was after the cause of action accrued ; and at this stage of the proceedings they may be held to aver in excuse for not paying the plaintiffs the money in his, the defendant's, hands, that it was stolen before that it became the defendant's duty to pay it to the plaintiffs. See the precedent of a similar plea well pleaded in *Chitty Junr.* 218.

But, on the threshold of this case a difficulty occurred to me of far more consequence to the defence than any mistake

in pleading, because it is one which, if my apprehension of the law and if my understanding of the evidence given at the trial be at all correct, must be fatal to the defence of this action, in whatsoever shape it may be defended.

The only foundation that I can see for the defence now set up is, that the defendant as agent for the plaintiffs, had in his custody certain bank notes and gold and silver coin, actually in each individual article the property of the plaintiffs, and that while they were so, and at the risk of the plaintiffs, because the individual things were their property, the things were lost without the fault of the defendant. I do not mean to say that according to the evidence in this case it was not within the scope of the defendant's authority to exchange one bank note or coin for another, so long as he acted as agent in the transaction for the plaintiffs,—I think, from the evidence, he had that authority; and so long as he acted within it, and kept the individual articles received in exchange distinguishable as the separate property of the plaintiffs,—I should hold that it remained in his custody at their risk, he being accountable only for negligent keeping, through which loss actually occurred.

The defendant himself is the principal witness in his own case; he is the only witness who pretends to account for his manner of keeping and disposing of the money and equivalents for money of the bankers of whom he was the agent. His testimony was given at great length, and I am not at liberty to imagine any thing more favorable to him than that which his own counsel brought forth in the examination in chief, or than that he was at liberty to state in answer to questions meant to be searching on the part of the cross-examination. I would remark, in the first place, that the monthly accounts produced at the trial proved beyond dispute, that according to the understanding and agreement between the principals and their agent the latter was intended only to be a bailee of the money not a debtor for its amount: in other words, he was possessed of the money as and for what the civilians would call a perfect deposit. He accounted for it in his monthly balances, not merely as for so much that he was indebted to his principals,

but he accounted or affected to account for it as so much that he had in the notes of the Gore Bank, so much in the notes of foreign or other banks, and so much in gold, and so much in silver coin.

His own testimony shews, however that these accounts rendered monthly were so far illusory that he never kept his own money or equivalents for money separate from those of his principals; they (that is, the money of both,) were kept mixed together; and all that he sought at the end of the month (upon his own showing) was to discover if he had *sufficient* to meet his liabilities to the bank: consequently, although he may have found so much in gold, so much in silver, so much in Gore Bank notes, and so much in foreign notes, and—as for instance, in the middle of February—several hundred pounds besides, he did not pretend to preserve any individuality in the money of the bank, as distinguished from his own money or that of others. He had a large business independently of the bank agency, which agency was of small emolument. He paid money, lent money, borrowed money, received money in deposit for safe custody, the receipts went into the same drawers as the bank money, the payments were made from the same aggregate of money; even since the robbery he paid a person named White some 300*l.*, which he says was left with him for safe keeping, but which was not robbed, because as defendant says, he had lent out nearly all but a sufficient sum to answer his liability to the bank. He only knew what money was in the safe by computation from his own and the bank books, and seems in the statements made immediately after the 10th of April, to have had considerable uncertainty in computing the amount. The sum of 63*l.* 17*s.* 6*d.* left by the robbers had an uncertainty with it as to whom it belonged.

Now the bank money was like the other money, a deposit for safe keeping. The defendant had no right to use or lend the one more than the other; and who is able to say that it was the one more than the other which was lent? Would it not have been as good an answer to any other claim as to that of the bank, that the particular

deposit had been stolen? And might not the same defence, have been set up to twenty different claimants if there had happened to have been so many depositors?

If an agent place his principal's money to his own account with his general banker without any mark by which it may be specified as belonging to the trust, and the banker fail, the agent will not be excused, because he *cannot* so deal with his principal's money as that if the banker's solvency continue he may be in a condition to treat it as his own, and if insolvency happen he may escape by considering it as belonging to his principal—Weir v. Kenton, 11 Ves. 382; Mussey v. Banner, 1 Jac. & Walk. 241; Fletcher v. Watkin, 3 Madd. 73; Cuffey v. Darby, 6 Ves. 496; 4 Mad. 413; Paley on Agency; 7 Sim. 178; Robins v. Ward, 2 C. & P. 59.

In the ordinary cases of deposits of money with banking corporations or bankers the deposit amounts to a mere loan or *mutuum*, or irregular deposit, and the bank is to restore not the same money but an equivalent sum, whenever it is demanded. But persons are sometimes in the habit of making a special deposit of money, and bills in a bank; where the specific money, the very gold or silver coin or bills deposited are to be restored, and the banking company has no authority to use the bills or money so deposited, but is bound to return it in *individuo* to the party—Story on Bailments, sec. 88. In a celebrated case, Foster v. The Essex Bank, 17 Mass. R., it was held that the bank was not liable though the special deposit was stolen by the cashier of the bank.—See 1 Esp. R. 315; Jones on Bailments, 39, 40; Story on Bailments, sec. 40; 15 Ves. 432, 6, 9, 40.

Now, I can see no sound distinction between the act of depositing the money of a principal to the general account of the agent, and that of mixing up the money of a principal with the agent's money; and I cannot see any valuable distinction between the mischief to arise from the agent dealing with the money of his principal so that if his banker's solvency continue he may treat the money as his own, and if insolvency happen he may escape by considering it as belonging to his principal, and the mischief to

follow from the agent mixing up the money of his principal with his own in an iron safe, using it as his own so long as he has occasion, treating it as his own so long as he is not robbed, and when the money is stolen considering it as the money of his principal. The bank of deposit and the iron safe may be considered as convertible terms: the agent had it not in his mind to restore the deposit in *individuo*; he says he was prudent enough to keep there an amount sufficient, in some species or another, to meet the liability to the bank. But would this be sufficient in the case of a deposit to the agent's account in a bank, that he had always taken care to have a balance in his favor sufficient to meet the demand of his principal? It certainly would not. How then can it be said, that the same prudence regarding the contents of an iron safe shall excuse the agent? Who can tell whether the *residuum* stolen was the money of the bank or of some one else.

Had it so happened that a portion of what the agent, according to his own testimony, preserved for the purpose of meeting the bank demand was composed of the notes of a bank which became insolvent after they were received, surely he would not be excused by the insolvency upon the feeble pretence, that although he had mixed up the bank notes of his principal with his own and with those of others, he still had always sufficient bank notes (supposing them good) to meet the balance in favor of his principal: the principal would in the first place require to know whether his agent received the notes of the insolvent bank in *individuis* in his (the principal's) business; and then, when that question was settled, and not till then, would arise the further question, whether the agent had used due caution in receiving the bank notes?

There is another test to be applied to the question now before me, the solution of which should, it appears to me, be conclusive upon the case:

Whether, under the evidence given by the defendant himself, the fund or property which he alleges to have been stolen was, at the time of the alleged larceny, in a situation to be reclaimed by the bank in *individuo* had the defendant

become a bankrupt, had he become insolvent, had executions issued against him, had he been an absconding debtor ?

The principal may, in many cases, follow his own property into the hands of third persons, when it has been transferred or disposed of contrary to his instructions ; and this doctrine is even more extensive in its reach, and the property can be followed so long as it can be traced. It will make no difference in law as indeed it does not in reason, into whatever form different from the original the change may have been made whether it be into promissory notes or other securities, or into merchandize, or into stock, or into money. The right only ceases *when the means of ascertainment fail*, which is where the subject being goods is turned into money, which is mixed and confounded in a general mass, having lost as it were its ear mark or identity and become incapable of being distinguished from the mass of the common money of the agent.—Story on Agency, sec. 229. But money in a bag, or otherwise kept apart from other money, or guineas or other coin specially designated for the purpose of being distinguished, are treated as so far ear marked as to fall within the rule already stated.—See the leading case, 3 M. & S. 576 ; 1 Salk. 160 ; Willis, 400 ; Paley on Agency, 90 to 95 ; 3 P. W. 185 ; 1 T. & J. 216 ; 1 Burr. 457 ; 3 Bur. 136 ; 1 B. & P. ; 1 Cowper, 200 ; Cheesman v. Exkell, 20 L. J. N. S. Ex. 209 ; S. C. Eng. Rep. L. & E. 4, 439 ; Neat v. Harding, 20 L. J. Ex. 250 ; Eng. Rep. L. & Eq. 494.

I do not see how the moneys could be followed in this case for the purpose of reclamation by the bank ; they were placed in a common deposit ; the amount not the identity, was attended to ; and whether the moneys stolen were those of the bank is more than any one can tell, and more besides than the defendant in this present case has any right to pretend to tell.

It is no answer to such an objection to the defence in this case, which objection has appeared insuperable to me, to show, as in the case of Jackson v. Anderson, 4 Taunt. 24, that where a plaintiff was entitled to a certain number of

dollars out of a larger quantity, and where the defendant was entitled to the remainder, but converted the whole, that trover would lie: no doubt but that this was a correct decision; but the facts are reversed in the case before us; and we must suppose the bailer of the plaintiff's dollars mixing them with his own, and then putting a portion in a place of safety, the remainder in a place which appears to him as safe, the latter part is lost, the former saved, can the bailee then—who improperly mixed his dollars with those of the bailer—be heard to say, that his money was saved and that of his principal lost?

The late case of *Wilkes v. Woodward*, 20 L. J. N. S. Ex. 261, Eng. Rep. of L. & Eq. 4, 510, was of like import; the defendant, who converted the whole of a stock of paper, was held estopped by deed to deny that the plaintiff had a separate property in the portion for which the action was brought.

In cases where the principal seeks to trace his own property in the hands of a bankrupt agent, or in those of his assignees, means of ascertainment of the principal's property in *individuo*, or in a transmuted state, are sufficient to establish the principal's claim, though the agent may have wrongfully dealt with the fund as his own. According to the defendant's evidence, I do not see the means of ascertaining left; but, even if out of the money which he says was stolen he were able to say, that at all events a certain portion was in money or bank notes actually received for the bank and remaining individually in the drawers, though mixed with the other money, I doubt very much if he could defend himself on the ground that the whole was stolen, and therefore this part received actually for the bank was also stolen. It must be remembered, that when the principal traces his property he does it notwithstanding the act of the wrong doer; he can follow his property so far as the act of the wrong doer has left it distinguishable; and in the trover cases cited here, (*Jackson v. Anderson*, *Wilkes v. Woodward*,) the owner is allowed to recover notwithstanding the wrong act of the defendant, and to say that although the property of the defendant was mixed with

mine, yet he converted both. But, in the present case, it is the *defendant* who, notwithstanding his own wrong act in mixing up his principal's money with his own, and habitually treating it in *individuo* as his own, when he finds it his interest, endeavours to restore its separate individuality. This I think he cannot do. A principal may follow a fund actually and provably distinct into a banker's hands: he may follow his own property wrongfully transmuted into other property, though the fund or property may have been placed in the name of or otherwise nominally that of the agent. But if the principal sue the agent, he who placed his principal's money in the hands of the failing banker, not in the principal's name but to his own general account, or who without authority transmutes his principal's property into securities or other property held in his own name, is not at liberty to follow the property and to say, notwithstanding my dealing with it, it yet belonged to the plaintiff and was at his risk. The defendant, in his testimony on the trial of the case, did not pretend to trace the identity of any part of the property, so that no question comes up here in contemplation of such a case. But even if he had, I do not at present see how I could hold it to be according to the intended course of transactions between the plaintiffs and defendant, that the latter should be at liberty to intermingle bank funds with his own, and then, in case of loss, to have the plaintiffs at his mercy in assigning the lost property and the loss to the plaintiffs.

Setting aside all questions about the reality of the robbery, I think there remains very great uncertainty about the amount of the sum said to have been in the safe, as well as what I consider a fatal uncertainty created by the defendant himself as to whether the money stolen was or was not the money of the plaintiffs. The latter point was not left so distinctly to the jury, or such instructions given to them upon it as might be after the discussion of this motion. These are strong objections therefore to the verdict. The state of the pleadings offer additional reasons why the verdict should not stand.

Since writing the above, I have seen the case of *Heald v.*

Carey, 21 L. J. Rep. N. S. C. P. 97, S. C. 9th Eng. Rep. of Law & Eq. In that case the bailee was held not to be liable in case of accident by fire, unless there were a repudiation of the rights of the owner, or the exercise of a dominion over the property inconsistent with that right. It is precisely the exercise of such a dominion which I take in this case to be a conversion of the plaintiff's money—namely, the admixture of it with other money with the intention of using the mass indifferently: this, I think, puts it out of his power to set up the defence upon which a verdict was given at the assizes.

I think therefore a new trial should be granted, and the pleadings should be amended before another trial. I think the costs should abide the event, for the reasons given by the Chief Justice.

Rule absolute—costs to abide the event.

HAMILTON V. RAYMOND.

Special agreement annulled—Quantum meruit.

A. under a special agreement dated, the 7th of July 1851, contracted with B. to build and finish a house and barn on or before the 10th of August, next, under a penalty of 5*l.* a day after that day, &c. A. did about two-thirds of the work, but did not finish it by the 10th of August, or at any time afterwards. B., after the default, took possession of the buildings, did work on them towards their completion, and paid a large portion of the price.

Held, per Cur., that the special agreement was annulled by the default of A., and the possession taken by, and the subsequent conduct of B.; and that there was an implied promise from B. to A. to pay him what the work was worth.

Assumpsit.—Declaration: 300*l.* Work by plaintiff and others for defendant; materials; carriage of goods by plaintiff and others, &c.; hire of horses, waggons, &c.; interest and account stated.

Pleas—1st, Non-assumpsit and issue.

2nd, Payment *post diem* and issue.

3rd, Set-off and issue.

This case was tried before the Chief Justice of the Common Pleas at the last assizes holden in London.

The plaintiffs' demand consisted of the three heads:—

1st. Work and labour, teaming, &c.

2nd—Building a house and barn for the plaintiff at a place called Coyle's Mill, in Walsingham.

3rd—Building a house and barn at Farr's Mills, in Middleton.

The *first*, to the amount of 13*l.* 17*s.* 1*d.*, was not disputed at the end of the plaintiff's case.

The *second* was for work done, under a special agreement in writing, made the 7th of July, 1851, whereby the plaintiff agreed to build and finish, &c., at Coyle's Steam-mill, on lot No. 2, 14th concession, Walsingham, on or before the 10th of August then next, under a penalty of 5*l.* a day after that day, &c., a house or barn as therein particularly specified, finding all materials except sheeting and floors, &c., for the sum of 90*l.*, and the defendant to furnish the lumber required at 20*s.* per thousand feet standard at the mills, common quality. It appeared that Coyle's Mill was situated remote from the settlement; that defendant did part of the work, about or exceeding two-thirds, but did not finish it by the 10th of August, or at any time afterwards. His neglect to do so was excused on the ground of some little delay at one time in getting lumber from the mill, but principally on the ground of the difficulty experienced in inducing the only mechanics to be had in that part of the country to go out to a place so remote, which was reputed unhealthy, and when no proper accommodation for boarding or lodging the workmen was afforded.

There was evidence that after the 10th of August, the defendant had taken possession of the house and barn, and availed himself of the work done by the plaintiff, and that the buildings had since been finished or rendered fit for use by the defendant. Also that the defendant had made advances, especially by a payment of 37*l.* 10*s.* made by him for and on behalf of the plaintiff after his default in completing the work. On the other hand, the defendant alleged that the non-completion of the work at or after the day was a very serious inconvenience and injury to him, and that the 37*l.* 10*s.* was assumed and paid by him only upon the plaintiff's re-assurance that he would go on and finish the job, which he had failed to do.

The *third* was for erecting a house and barn for defendant, under a special verbal agreement, at Farr's Mills, in the year 1851.

The plaintiff proved the work to have been done, and there was evidence that the sum to be paid therefor, and its value, equalled 125*l.*, or more. The defence was, that the defendant was not liable.

It appeared that the mill and premises originally belonged to Farr : that Farr conveyed the same in fee to the defendant, but only in security for moneys due by Farr to him, and in trust to sell, &c. : that while estate was in him the defendant's proposals were made to the plaintiff to erect a house and barn, in the first place according to a plan furnished by Farr, but which plan the plaintiff said the defendant had destroyed, alleging that as he was to pay for it he would not consent to such a plan, and substituted one of his own : that before the work was commenced defendant sold the property to Sage, of Albany, but upon the understanding that the defendant was to be responsible for the erection of the house and barn, the value of which was included in the consideration to be paid by Sage : that afterwards, and before the work was commenced. Sage sold back to Farr, the defendant received from Sage only the amount due to him by Farr, not including the price of these buildings, Farr and Sage arranged between themselves respecting the balance of the consideration.

It was stated by the plaintiff, who was examined on his own behalf, that he contracted to do the work with the defendant, and did it upon the faith thereof and upon his credit, and he denied having ever agreed to look to Farr or having done it upon his credit, although he did other work at the mill for Farr, and some extras to this job on Farr's account, and there were other accounts between them. Other witnesses were also examined, and gave evidence tending to shew that the defendant had admitted that he had contracted with plaintiff, and was to pay him for the work as much as 150*l.*

On the other hand, the defendant, examined on his own behalf, stated that he had only intervened as agent on

behalf of Farr. He denied having ever contracted with the plaintiff or agreed to pay him for the work, but alleged that all he did was on behalf of Farr, to whom plaintiff was to look for payment. Farr said that after he purchased from Sage, and before the work was commenced, he told the plaintiff of his interest in the premises, and that the plaintiff then agreed to do the work on his account; that he had furnished him a bill of the lumber wanted; that he (Farr) got out the timber, and had made advances to the plaintiff on account. This however the plaintiff denied, alleging the payment to be on account generally, and only applicable to other demands.

The defendant also claimed a set-off, amounting to 79*l.* 3*s.* 10½*d.*, including the 37*l.* 10*s.* on account, and 14*l.* for lumber on the Coyle job, which set-off the plaintiff admitted.

On the whole evidence, it was left to the jury :

1st—To allow the plaintiff the account not disputed, 13*l.* 17*s.* 1*d.*

2nd—To allow him what he had done to the Coyle job, if the defendant accepted or took the benefit thereof, of which there was evidence—the amount claimed being 75*l.*

As to this item, the defendant's counsel objected the plaintiff could not recover, the work being done under a special agreement, not performed, and still executory.

3rd—To allow the plaintiff for the work at Farr's, if satisfied the defendant did agree to pay him, and that the plaintiff did the work for him and on account of Farr under a substituted agreement.

The jury found for the plaintiff 129*l.* 13*s.* 3½*d.*, made up as follows, as stated by the jury :

| | | | | |
|---|---|-----|----|-----|
| 1st—The teaming account, &c..... | £ | 13 | 17 | 1 |
| 2nd—On account of the Coyle job..... | | 70 | 0 | 0 |
| | £ | 83 | 17 | 1 |
| Less amount of defendant's set-off..... | | 79 | 3 | 10½ |
| | £ | 4 | 13 | 3½ |
| 3rd—On account of the Farr job..... | | 125 | 0 | 0 |
| | £ | 129 | 13 | 3½ |

During last term *Becher*, for the defendant, obtained a rule upon the plaintiff to shew cause why such verdict should not be set aside, without costs, as being contrary to law and evidence, and perverse, or upon payment of costs, as being against the weight of evidence and unjust.

Cooper shewed cause, and contended that the verdict was quite consistent with law and evidence ; that it was left fairly to the jury upon conflicting evidence ; was in no respect illegal, nor was it against the weight of evidence nor unjust : that the plaintiff had done all the work allowed for ; that there was ample evidence to prove it done on the defendant's account, and that it was just he should pay him accordingly.

Becher, for defendant, in reply, contended :

1st—That the Coyle contract was special, unperformed, and still executory when the action was brought, and that nothing should have been allowed therefor.

2nd—That the demand against the plaintiff upon the Farr job was not supported by the evidence, and that the verdict was unjust in relation to both items and ought to be set aside.—*Basten v. Butter*, 7 East. 479 ; *Farnsworth v. Garrad*, 1 Camp. 38 ; *Cutter v. Powell*, 6 T. R. 320 and note ; 2 *Smith's Leading Cases*, 1 to 12 ; *Pudage v. Cole*, 1 W. Saunds. 320 ; *Puters v. Opie*, 2 ib. 352 ; *Burn v. Miller*, 4 Taunt. 745 ; *Cotterell v. Apsey*, 6 Taunt. 322 ; *Sinclair v. Bowles* ; 5 Dow. 166.

MACAULAY, C. J.—1st, as to the Coyle job : The question is not, whether the performance of the work is a condition precedent to the plaintiff's right to be paid the 90*l.*, as if he had declared specially therefor upon the agreement, without averring performance of the work at or after the 10th of August, or any excuse for not performing it ; but it is whether, having performed a great portion of the work without being paid, he can recover the value thereof, as for work, labour, and materials, furnished at the defendant's request, although the plaintiff's part of the agreement was not executed at the day, nor completed at any time afterwards.—Cases *supra*, and *Thornton v. Place*, 1 M. & Rob. 219 ; *Chappel v. Hicks*, 2 C. & M. 214 ; *Lucas v. Godwin*,

3 Bing. N. S. 737 ; 4 Salk. 301, S. C.; *Turner v. Diaper*, 2 M. & G. 241 ; *Wimshurst v. Deeley et al.*, 2 C. B. 253 ; *Kewley v. Statles*, 2 C. & K. 435 ; *Barton v. Fisher*, 3 U.C. Q. B. R. 75 ; *Watson v. O'Beirne*, 7 U. C. Q. B. R. 348.

The inference from all these authorities seems to me to be, that if the contract is entire and still executory, the plaintiff cannot recover under the first count for work, labour, and materials, until it is executed, unless the time be past and the non-completion of the work was prevented by, or the fault of, the defendant, and not of the plaintiff.

Here the work was not finished by the day appointed but *Lucas v. Godwin*, as well as the terms of the agreement, (having a penalty after the day) shew that the day or time was not the essence of the contract.

Still, not being completed at the day, it continued and was executory after the day. The defendant was willing and desirous that the plaintiff should go on and finish it, without any default on the defendant's part, for I do not consider any delay on the plaintiff's part for want of lumber material in this action, if time was not conditional or of the essence of the agreement, whatever its importance might be in a cross-action for non-performance of the work at the day. It rests then upon the consideration whether the agreement remained executory at the time the action was brought. If the defendant had refused to accept or take possession of these buildings in an unfinished state, or until finished, but assented to the plaintiff's going on and completing the contract, the defence would certainly be a good one. But it appears, that after the plaintiff's default, the defendant took possession, availed himself of the work done by the plaintiff, sold or appraised the premises to another, and that the defendant, or his agent as then holding under him, not only assumed and occupied the building, but did additional work thereto and towards the completion thereof. The defendant also paid a large part of the price after the day.

Under these circumstances, I am disposed to think that the special agreement was terminated by the default of the plaintiff and the possession taken by, and subsequent

conduct of the defendant, so that the door was opened to the implied assumpsit, a promise by defendant to pay plaintiff what the work so accepted was worth, and on which implied promise this action is founded. Otherwise the plaintiff, owing to the defendant's acts, will be precluded from recovering anything from what he did and from hereafter finishing the work so as to entitle himself to the whole sum.

It seems the just rule that the plaintiff should recover what his work, labour, and materials were worth, being compensated *pro rata* according to the value of the work done, as compared with the whole work valued at 90*l.*, and that any claim of the defendant's to enforce the penalty or to recover damages for disappointment, delay, and consequential damage, should form the subject of a cross-action. *Duckworth v. Alison* ; 1 M. & W. 412 ; *Holme v. Guppy*, 3 M. & W. 387, 90.

2nd—As to the Farr job : It was a matter of fact that the plaintiff had contracted with defendant and did the work on his credit. The defendant's assertion that he only acted from the beginning as Farr's agent is not corroborated by Farr, but the statement he made was inconsistent with it. It was likewise a good deal inconsistent with it that the defendant should have included the value of the buildings in the sale to Sage and bind himself to him that they should be erected. That the defendant did contract with the plaintiff (whether as a principal or agent) is admitted. That he contracted as a principal, the plaintiff's assertion and Farr's evidence tends to corroborate, and defendant's owning the estate at the time has the same tendency. Then, if defendant contracted as principal, the jury negatived the assertion of Farr that he was afterwards substituted for the defendant, and there is no proof that the defendant ever gave notice to the plaintiff not to go on on his account, or that he disclaimed or repudiated any liability after he sold to Sage, or after Sage had sold to Farr, but the plaintiff was permitted to do the work without any notice or countermand, so far as the defendant was concerned. Then as to the real fact, the jury have found the work done by plaintiff

under a contract made with the defendant, and so done *bona fide* on the faith of such contract, and on the defendant's credit.

No new facts are suggested, and the whole question is whether on the same evidence, there being evidence on both sides, the case should be submitted to another jury. It is not the usual course in such cases. Had the verdict been the other way it would not probably have been disturbed, and as it is, I cannot say I am dissatisfied therewith to a degree warranting me in disturbing the present verdict.

McLEAN, J., and SULLIVAN, J., concurred.

Rule discharged.

LITTLE V. THE DUNDAS AND WATERLOO MACADAMIZED ROAD COMPANY.

Tolls.

A road company is, under the statute 14 & 15 Vic. ch. 122, sec. 3, authorized to take tolls at each gate at each time of passing, for any portion of the road, on either side, or on both sides of a gate, for a distance of not more than half-way to the next gate or gates upon the same road, and not exceeding five miles in the whole.

Semble, that money paid as tolls, under compulsion, in order to enjoy a road, may be recovered in an action for money had and received.

Assumpsit for money had and received.

Plea—*Non assumpsit*.

This case was brought to trial at the last Gore Assizes, before Mr. Justice Draper; and in opening the case the plaintiff's counsel stated that the action was brought to recover from the defendants—an incorporated company under 12 Vic. ch. 84—moneys paid at different times as tolls, demanded by them for the use of the road constructed by them, by the plaintiff, with his horses, waggons, &c.; the defendants being authorized by law to collect tolls, but the plaintiff contended that they have taken more than the statute (14 & 15 Vic. ch. 122, sec. 3) authorized, and consequently that the whole or part of the excess is illegally taken by them. The plaintiff contends it was excess, because the gates are four miles fifty-seven chains apart: that the plaintiff's place is one chain and twenty-four links

beyond gate No. 2, and the road terminates twenty-eight chains ninety-two links beyond the next gate, No. 1. Defendants received seven-pence half-penny for a waggon drawn by two horses at Gate No. 2, and four-pence at gate No. 1, each time of passing each gate, going and returning, no matter what distance was travelled on the road. Plaintiff says they should only have charged one penny half-penny per mile actually travelled by such waggon and horses on the road ; and that under no circumstances could they legally take seven-pence half-penny at Gate No. 2, nor four-pence at Gate No. 1. Plaintiff complained of these charges, and that the gate-keeper would not allow his teams to pass without paying the tolls at each gate every time they passed, in consequence of which the plaintiff did pay the tolls demanded.

Upon this statement of the plaintiff's counsel, the learned judge ruled that the plaintiff could not recover in this action, and the plaintiff was nonsuited, with leave to move.

Martin, pursuant to leave reserved, moved in Easter term to set aside the nonsuit ; and on the argument alleged that one of the grounds of nonsuit was, that an action for money had and received would not lie in such a case ; and the other, that even if it did lie, that according to the statement made, the defendants had not received for tolls a larger amount than they were entitled to.

Martin, in support of the rule, referred to the statutes 12 Vic. ch. 84 ; 13 & 14 Vic. ch. 14, sec. 1 ; 14 & 15 Vic. ch. 122, secs. 3 and 4 ; and contended that the penalties imposed for taking too much tolls do not apply to cases like the present, and that unless a party can recover his money he has no remedy : that the defendants have received tolls beyond what they were entitled to : that the statute 12 Vic. ch. 84, secs 15 & 16, authorizing certain tolls, has been repealed by 14 & 15 Vic. ch. 122, sec. 3, which says that tolls may be taken at any gate for half-way between that gate and the gates on either side.

Cameron, Q. C., contra.—That the statute 12 Vic. ch. 84, secs. 15 and 16, is not repealed, but only varied so far as to enable gates to be placed at unequal distances—the

rate per mile being payable for half the distance between any one gate and those on each side of it; that the plaintiff paid the amounts voluntarily, and without duress or extortion by the defendants.

McLEAN, J.*—On reference to the learned judge as to the grounds of nonsuit, as they are not contained in his notes, he mentioned that at the time of the trial he entertained the opinion that an action for money had and received would not lie to recover back moneys paid under the circumstances of this case; and, as there are penalties prescribed by the statute for exacting more than is allowed by law to be taken for tolls, he was under the impression that the proper, if not the only mode of proceeding to prevent any improper charges, was by indictment. He further stated that on looking into cases since the trial, he had changed his opinion upon that point, but that he was still satisfied that more had not been taken for tolls than the statute allows, according to the statement of the plaintiff's counsel in opening the case.

As to the first ground: If money was not voluntarily paid, but was paid under compulsion in order to enjoy the use of the road, I have no doubt that it may be recovered back in an action for money had and received. The cases of *Parker v. the Great Western Railway Co.*, 7 M. & G. 253; and *Pickford v. the Grand Junction Railway Co.*, 10 M. & W. 399; and the case of *O'Hara v. Foley*, 3 U. C. Q. B. R. 216, establish that point beyond any question.

Then, with respect to the second point: The plaintiff's counsel contended that as the plaintiff's teams and waggons only used the road for a very short distance beyond gate No. 2, which was the nearest to them, and the first through which they usually passed from the plaintiff's saw mill, they could not legally be charged tolls as if they used the road half the distance between that gate and gate No. 3; and that the plaintiff was only bound to pay at the rate of a penny half-penny per mile for the distance actually travelled on the road. A reference to the 16th section of 12 Vic. ch. 84,

* MACAULAY, C. J., not being present at the argument, gave no judgment in this case.

shews that the amount of toll authorized to be levied for each time of passing, whether loaded or otherwise, is limited to an *aggregate sum* calculated at the rate of one penny half-penny per mile from the gate required to be passed to the last gate in the direction whence any person may have come, for any vehicle drawn by two horses. This clause is so far varied by the 3rd section of 14 & 15 Vic. ch. 122, that instead of receiving tolls at the same rate for the distance between the gate required to be passed and the last gate in the direction whence the person may have come, tolls may now be taken at each time of passing each gate for any portion of the road on either side or on both sides of a gate, not being more than half way to the next gate or gates upon the same road, and not exceeding five miles in the whole ; so that in passing gate No. 2, by the plaintiff's teams, the gate-keeper was entitled to demand toll at the rate of one penny half-penny per mile for every waggon and pair of horses for half the distance between gates No. 2. and No. 3 on one side, and half the distance between No. 2 and No. 1 on the other side—not exceeding five miles ; and at that rate the amount would be precisely what the plaintiff complains of having been exacted, viz., seven-pence half-penny. It may appear unjust to the plaintiff that he should be obliged to pay as if he travelled over with his teams half the distance between gates Nos. 2 and 3, when in fact only a few yards were used between these gates before coming to No. 2 ; but if the plaintiff were so situated that his teams could take the road on the other side of No. 2, so that he would not require to pass that gate, he might be entitled to travel over the whole distance from gate No. 2 to No. 1 by paying a penny half-penny per mile for half the distance. At all events, whatever the hardship may be of the plaintiff's position, the statute clearly authorizes tolls to be taken at each gate for half the distance between that and the gates on each side ; and the sums exacted and alleged to have been paid appear not to have exceeded the amount allowed by law to be taken. Under these circumstances, though the learned judge appears to have entertained an erroneous opinion as

to the action being sustainable, as no advantage could result to the plaintiff by setting aside the nonsuit, I think the rule must be discharged.

SULLIVAN, J.—The statute 12 Vic. ch. 84, sec. 15, enacts “that the amount of tolls hereby authorized to be levied at any gate by any such company, shall not, for each time of passing, whether loaded or otherwise, exceed an *aggregate* sum, calculated at the rate of one penny half-penny per mile from the gate required to be passed to the last gate in the direction wherein any person may have come, for any vehicle, &c.”

This section in express terms makes the sum to be paid an aggregate amount at a certain rate per mile for the distance between two gates, to be paid on passing a gate.

The statute 13 & 14 Vic. ch. 14, makes no alteration in the amount of tolls, while it extends the provision of the 12th Vic. to companies formed for the purpose of acquiring public works.

The statute 13 & 14 Vic. ch. 122, sec. 1, repeals the 16th section of 12 Vic., and by sections 3 it substitutes the following provision :

“That tolls may be taken by any such company *at each time of passing each gate*, upon any road constructed by such company, *for any portion of such road*, on either side, or on both sides of such gate, not being more than half way to the next gate or gates on the same road, if any, and not exceeding five miles in the whole, or for the whole of such road if the length thereof do not exceed five miles : and if there be only one gate thereon, then at the following rate per mile.”

The argument is, that the charge on passing the gate is to be for *any portion* of such road, on either side, or on both sides of the gate, not being more than five miles in the whole : that this is not an aggregate sum calculated upon the length of road passed, and the last gate, as in 12 Vic., but for any portion not being more, &c., but which may be less ; and that this minimum can only be ascertained by the use actually made of the road.

The absurdity of supposing an act of parliament to require

a toll man to know the distance which every traveller has come along the road, and still more, to require him to divine how far the traveller intends to go after passing the gate, with the additional absurdity of permitting travellers to apportion the toll by the miles actually travelled within a certain distance, and allowing them to go free of tolls for the miles actually travelled beyond that distance—that is to say, beyond the half-way points between the toll-gate passed and the gates at each side thereof—should, I think, shew that the construction contended for by the plaintiff's counsel at the trial is not the true one. The words of the statute are not “for any portion of the road travelled,” but for any portion of the road “not exceeding a certain portion.” The limitation is evidently not for the purpose of making it necessary to inquire the distance travelled, but the placing of gates at unequal distances, and yet as far as possible to equalize the tolls: and probably also to provide for the exaction of tolls at the entrance gate, at the proportion of half the distance at one side of the gate, and between the entrance gate and the next.

Thus, for example, by dividing a road into distances of five miles each, it is not necessary to place the gates at the beginning or the end of each distance of five miles: they may be placed at any points within each five miles, and yet the charge may be uniform. This is very convenient for some purposes, and may yet still leave it open to persons to be charged out of proportion to their ordinary use of the road, where they dwell between gates nearer to each other than the average proximity.

The arguments used by the plaintiff's counsel, that statutes intended to impose burdens should be read strictly, has great weight; yet still I conceive that all statutes must be construed with reference to the subject matter of which they treat. This case, for example, is very different from that of a railway or canal, when the toll is charged at so much per mile of the way used.—11 Clark & Fenilly, 590. And moreover, this is not the case of a private act of parliament framed by the defendants for their own purposes, but that of a general act, with the drawing up of which the defendants had nothing to do.

A question appears to have been raised at the trial, of the precise nature of which it is difficult now to be informed, as the facts were not proven, or very strictly stated as intended, to be proved. It was probably either the simple one, whether an action for money had and received to the plaintiff's use would lie for tolls illegally exacted; or whether, supposing that such an action could be maintained against an individual, could it be sustained upon an implied contract against a corporation aggregate.

The case of *Hull v. the Mayor, &c., of Swansea*, 5 Q. B. 526, citing the cases of *Beverly v. the Lincoln Gas Co.*, 6 Ad. & El. 829; *Church v. the Imperial Gas Co.*, 6 Ad. & El. 846, and a variety of other cases, seems to settle both questions up to that time, in favour of an implied assumpsit on the part of a corporation aggregate to pay back money illegally exacted. *Neat v. Harding*, 20 L. J. N. S. Ex. 250; S. C. 4 Eng. Rep. L. & E. 494; sustains the doctrine "that the owner of property has a right to follow it, and adopt any act done to it, and treats the proceeds as money had and received to his use."—*Lawrence v. the Great Northern Railway Co.*, 20 L. J. Q. B. 293; 19 L. J. C. P. 193; 20 L. J. 256, Jur. 652.

My opinion is, that if the plaintiff could have proved tolls illegally exacted by duress of plaintiff's vehicles passing on the road, or money paid for tolls illegally demanded (under protest, and for the purpose of being allowed to pass) that the action would lie; but according to the statement of the plaintiff's counsel as to what he intended to have proved, I do not think illegal tolls were demanded. I think that the true construction of the statute 14 & 15 Vic. ch. 122, sec. 3, is, that the company may exact at each toll gate for every time of passing, tolls at the statutory rate per mile, according to the distance at one side of the gate to a point half-way between that gate and the next. If the gate be only an entrance gate, and according to the distance to the half-way points at each side of the gate between the gate and those on each side respectively—and this without regard to the extent of actual user of the road—I do not find from the judge's notes, or from the statement of the plaintiff's counsel, that

more has been exacted; and I think therefore that this rule must be discharged with costs.

Rule discharged.

STEVENSON v. RAE.

Contradictory evidence—Commission not returned as ordered.

Defendant having agreed to deliver plaintiff a quantity of pork which would pass inspection in Montreal as of a certain quality, which it did not, and an action having been brought, and the evidence at the trial as to the quality of the pork being contradictory, the court refused to disturb a verdict rendered for the plaintiff, on the ground that it was for the jury to decide between the evidence of the plaintiff and that of the defendant.

An objection taken at Nisi Prius to the admission of evidence taken under a commission, on the ground that the commission was not returned to the office of the Deputy Clerk of the Crown pursuant to the judge's order, was held bad.

This was a special action of assumpsit, brought for non-fulfilment of a contract for the delivery of certain quantities of pork (four hundred and seventy barrels), of particular qualities and descriptions, to pass and bear inspection at Montreal as of such qualities and descriptions. The plaintiff alleges that he received the quantity of pork from defendant, yet that the said pork was not then nor was any part thereof of the respective descriptions or qualities contracted for, but the same and every part thereof was then of inferior description and bad quality: and further, that the said pork, at the time of making the defendant's promise as to the quality, &c., or at any time since, would not, nor would any part thereof, pass or bear inspection at Montreal as of the said several descriptions or qualities, or any or either of them. And the plaintiff alleges that in a reasonable time, in that behalf, after the receipt of the said pork, he caused and procured the said pork to be inspected at Montreal, by the proper officer in that behalf, and that the several parcels thereof did not then stand inspection as of the respective qualities agreed upon, but on the contrary thereof all the said pork was bad, and of an inferior description, and of little value, contrary to the promise and agreement of the defendant; of all which the plaintiff had notice: by reason whereof, plaintiff was obliged to sell the pork at Montreal at a less price than he would have obtained had it been of a quality to bear inspection at Montreal, according to

defendant's promise ; and plaintiff has been put to expense, &c.

The second count is for a breach of contract for a further quantity of pork, nearly the same as in the first count.

Third count, money had and received to plaintiff's use.

Pleas to the first and second counts—That at the *time of the making of the said promises* and the *delivery* of the said pork, the same was of the respective qualities agreed upon, and would *then* pass and bear inspection at Montreal as of such qualities and descriptions respectively—concluding to the country ; and non-assumpsit and set-off to third count.

Issue was taken to these pleas, though the contracts stated in the declaration are, that the pork *would* bear inspection at Montreal ; and the pleas are, that at the time it was delivered it would bear inspection at Montreal, thereby throwing on plaintiff the onus of proving not only that it did not pass inspection at Montreal, but that when delivered at Hamilton it was not of such quality as would then pass such inspection.

The cause was tried before Mr. Justice *Draper*, at the last assizes held in Hamilton for the United Counties of Wentworth and Halton. The plaintiff's counsel tendered evidence, taken under a commission at Montreal, on plaintiff's behalf. The commission, closed under the hands and seals of the commissioners, was produced, but the reception of the evidence taken under it was objected to by defendant's counsel, on the ground that the judge's order for the issuing of a commission directs "that the interrogatories and the depositions taken therewith be returned to the office of Alexander Stewart, Clerk of the Crown and Pleas for the United Counties of Wentworth and Halton, at Hamilton, under the hand and seal of the commissioners, or either of them ; and that either party may take an office copy ;" and that in fact the commission had not been so returned, and the defendant was deprived of the opportunity of seeing the evidence taken under it.

The learned judge ruled that he could not entertain an objection which did not relate to the execution of the commission, but to a matter unconnected therewith.

The plaintiff's case rested on the evidence taken at Montreal, under the commission. On the part of the defence, several witnesses were called, who had been engaged in the packing of the pork, and who testified that the pork was what is termed "hard pork," and was of the quality contracted for when packed and delivered: they also testified that exposure to the sun for a length of time on a wharf would have the effect of making the pork appear as soft pork, still-fed pork, which is called soft pork in contradistinction to grain-fed pork, which is called "hard pork;" and that the pork in question had been exposed on Browne's wharf at Hamilton during the month of April.

Several witnesses besides the packers stated that exposure to the heat of the sun would render pork soft; but one defendant's witnesses (Richard Scobell, a pork inspector at Kingston,) stated that pork should not be exposed to the sun and heat; that it will make the hard pork soft, and will prevent its passing inspection as hard pork *of a good quality*, but that if exposed for six months he could tell corn-fed or hard pork from still-fed or soft pork.

In the testimony of the licensed inspector of pork at Montreal, the mode of inspection is particularly described, and the result of the inspection of the pork in question is given; by which it appears that a large portion of the pork was soft-pork, still-fed, some of it boar pork, some of it heads and limbs, and only a part of it answering the descriptions contracted for.

On the evidence, the learned judge left it to the jury to say whether the pork, when delivered at the wharf, was in good condition, and such as would pass inspection.

The jury found a verdict for plaintiff, for the amount of damages claimed (144*l.* 5*s.*), and declared that they found the pork delivered was not hard-fed pork.

In Easter term, defendant obtained a rule calling on plaintiff to shew cause why the verdict should not be set aside and a repleader ordered, the verdict having been given for the plaintiff on immaterial issues; or for arrest of judgment, and award of *venire facias de novo* for error in the Nisi Prius record, and because a general verdict was

rendered for plaintiff on evidence given on some of the issues only ; or why a new trial in the cause should not be granted, because of irregularity in the production by the plaintiff of evidence taken under a commission in this cause, and for surprise, and the discovery of new evidence, and on facts disclosed in affidavits filed ; and that both parties be allowed to alter or amend their pleadings.

An affidavit of Mr. Logie, the defendant's attorney, was filed in support of this motion, and refers chiefly to the fact of the commission not having been returned to the Deputy Clerk of the Crown, according to the order of the judge, so that the evidence might be seen by both parties, from which, as it is alleged, an injury hath arisen to the defendant. Mr. Logie also states that no evidence was given to support the issues on the third and fourth pleas.

The defendant has also filed an affidavit, in which he states that he has been informed and believes that the pork was not properly inspected at Montreal, and that if a new trial is granted he believes he will be able to prove that fact, and to give material and important evidence, which he could not give at the last trial ; and further, that a part of the evidence given on the last trial could have been contradicted by the defendant, but that having been in court during the trial he was informed that he could not be called to give evidence.

Cameron, Q.C., shewed cause.—That no objection was made at *Nisi Prius* to the form of the *Nisi Prius* record ; and that the commission was used at the trial by the defendant's counsel, and that he cannot now object to it.

Hagarty, Q. C., in reply, said, that in consequence of the agreement between the plaintiff's and the defendant's attorney, no one attended the execution of the commission on behalf of the defendant at Montreal—the defendant relying on seeing the evidence and being able to rebut it by other evidence on the trial : that the venire is to summon the jury from the district of Gore, and not the united counties, &c.

McLEAN, J.—It appears to me that no sufficient ground is shewn for disturbing the verdict or for arresting the judg-

ment in this case. The issues cannot be said to have been immaterial; for the defendant's contract is stated to be for the delivery to the plaintiff of pork which should bear inspection at Montreal. The defendant says he did deliver such pork at Hamilton—that is, pork which would bear inspection at Montreal; the evidence shews that the pork delivered was not such as would pass inspection as of the several qualities agreed upon, and in fact that it did not pass inspection. The evidence of the inspector at Montreal establishes both these points, and it was for the jury to decide between his statement and that of other witnesses for plaintiff, and the testimony of the defendant's witnesses, who swore that the pork was all of the quality contracted for. They chose to believe the plaintiff's witnesses, and we cannot assume that they were wrong in doing so.

Then, as to the reception of the evidence under the commission, it appears to me the learned judge could not properly reject it. It was properly taken; cross-interrogatories were put by the defendant to plaintiff's witnesses; and the defendant can scarcely be supposed to have been ignorant of the testimony given. If in truth he was so ignorant—a fact which I do not see distinctly stated in the affidavits—and that the inspection of the testimony was essential to him, he should have moved to put off the trial, on the ground of such inspection not having been afforded.

But no such motion was made, though the defendant must have been well aware that the plaintiff could only support his case by the testimony taken under the commission at Montreal. The cause had been entered for trial, as appears by the affidavit, at the assizes in November last, but was made a remanet from the want of time to try it at that court; and at the last assizes, I find by the consent of the defendant's attorney, that the record was entered with the clerk of assize on the 18th of May, with the understanding that it should not come on for trial before Tuesday then next, the 25th of May. The consent is in these words: "I consent to the case being entered so as it will not come on for trial before Tuesday next, the 25th instant." When the defendant's attorney gave this consent to the entering of the

record, no objection seems to have been entertained to the cause being tried on the ground that the evidence had not been duly returned and communicated. The record was entered on the 18th May, and the cause was not tried, as appears by the judge's notes, till after the 26th of May; during all which time no objection seems to have been urged on the subject of the commission, although Mr. Logie states that he had previously called at the Deputy Clerk of the Crown's office several times to enquire for it. If, indeed, it were clearly shewn that any injury has arisen to the defendant by the commission not having been open to inspection before the trial, the court might grant relief on payment of costs; but no such injury is shewn. The defendant says he believes the pork was not properly inspected, and he believes he will be able to shew that fact on another trial; but I apprehend it would not be competent for him to shew anything of the kind. It was inspected by the proper person, and failed to pass inspection, as agreed upon; and whether it was properly inspected or not could not affect the defendant's contract that it *would* pass inspection. But the mode of inspection is detailed in the evidence of the inspector; and as to its being proper or improper must be a mere matter of opinion, which could not affect the result of the cause. It is not shewn what evidence given for the plaintiff could have been contradicted by the defendant; it may have been in some matter wholly immaterial, but if otherwise, it is no ground for a new trial that defendant did not give the evidence at the time which he says he could have given, because it was supposed that he could not be called in consequence of his having been present in court.

As to the issues on which no evidence was given, the defendant is entitled to have a verdict entered for him. On the plaintiff consenting to have it so entered, this rule will be discharged.

SULLIVAN, J., concurred.

MACAULAY, C. J., not having been present during the argument, gave no judgment.

NAFIS & CORNISH V. JOHN SOULES & WILLIAM D. SOULES.

Assumpsit on bill of exchange.

A joint acceptor of a bill of exchange cannot be heard to say (as between himself and the plaintiff) that he was a surety for the other acceptor, and is on that account discharged by time without his assent having been given to his principal.

1st count.—On a bill drawn by plaintiffs on the 19th of February, 1848, whereby the plaintiffs required the defendants to pay to them 57*l.* 8*s.* 11½*d.* thirty days after date; averring acceptance by the defendants, and that they thereby became liable to pay the same to the plaintiffs, according to the tenor and effect, &c.

2nd count.—On a bill of the same date, and for the same amount, at sixty days after date; averring acceptance, as in the first count, &c.

3rd count.—On a bill of the same date and amount, payable ninety days after date; the same as first count.

4th count.—For 225*l.*, for goods sold and delivered, and account stated.

Pleas.—1st, to first, second, and third counts—That defendants did not accept.

2nd, to fourth count.—Non-assumpsit.

3rd, to first count, by John Soules.—That he accepted the bill in the first count mentioned, at the request of, and as a mere surety for, William D. Soules, and as a better security to the plaintiffs for the amount, and not on any other account, and that there never was any value or consideration for his acceptance—of all which the plaintiffs had due knowledge and notice; that after such acceptance, and after the bill became due, and before the commencement of this suit—to wit, on the 25th of March, 1848—it was agreed between the plaintiffs and William D. Soules, without defendant John Soules's consent, for a consideration to him unknown, that the plaintiffs should give to defendant William D. Soules time, and forbear to sue him for the amount of the bill for a period of nine months from the time of making the agreement; and that time was given to William D. Soules, without the assent of defendant John Soules; and that he did not at any time consent to, approve of, or ratify, the said agreement.

4th, by John Soules, setting out his acceptance of the bill in the first count mentioned as surety, &c., want of consideration, and notice of the plaintiffs: that after the acceptance of the bill by him, and after the same became due, and before the commencement of this suit, defendant William D. Soules was indebted to the plaintiffs in the amount of the bill in the first count mentioned, and to divers other persons in large sums of money, and was in bad and embarrassed circumstances, and unable to pay the plaintiffs and the said creditors in full; of which the plaintiffs had notice; and thereupon, without the consent of defendant John Soules, by a certain indenture then made between defendant William D. Soules of the first part, and Charles Lord Helliwell of the second part and the plaintiffs and the other creditors of William D. Soules of the third part, of which indenture profert is made, the said William D. Soules, for the consideration therein mentioned, did grant, bargain, sell, assign, and transfer unto the said Charles Lord Helliwell, all and singular the stock in trade, debts, books of account, bills, notes, and all other personal estate and effects whatsoever, and wheresoever situate, of him the said William D. Soules, upon trust; amongst other things, to pay and apply the proceeds thereof ratably amongst the plaintiffs and said other creditors respectively;—that the plaintiffs, in consideration thereof, did by the said indenture, without the consent, leave, or license of defendant John Soules, covenant, promise, and agree with defendant William D. Soules, that they would not within the space of nine months next after the execution of said indenture, sue for said debt so due and owing to them, or molest or prosecute the said defendant William D. Soules for or in respect thereof; and the plaintiffs did thereby further agree, that in case any action should be commenced by them within the time aforesaid for the recovery of the said debt, defendant William D. Soules should be forever released and discharged from the payment of the same; and that the plaintiffs, in pursuance of their covenant, did forbear to sue, and did not molest or prosecute defendant William D. Soules during the said period for the

amount of the said bill of exchange, without the consent, leave, or license of defendant John Soules;—and that the defendant did not at any time consent to ratify or approve of the said indenture or the said covenant and agreement last aforesaid.

Pleas.—The same as the 3rd and 4th to the 1st count, are pleaded to the 2nd and 3rd counts, on the bills of exchange.

Demurrers.—These pleas are demurred to specially, on the ground that it is not shewn that plaintiffs were the holders of the bills at the time of the making of the agreement; that by each of the pleas, defendant John Soules attempts to set up as a defence, that he accepted the said bills as a security for William D. Soules, which he is estopped from doing; and that the pleas shew no good defence to the action on the several bills, inasmuch as defendant John Soules is on the said bills liable as a principal jointly with the said William D. Soules.

M. C. Cameron, in support of the demurrers, cited *Dean v. Newhall*, 8 T. R. 168; 5 Esp. 178; *Fentum v. Pocock*, 5 Taunt. 192; *Maltby v. Carstairs*, 7 B. & C. 755; *James v. David*, 5 T. R. 141; *Thimbleby v. Barron*, 3 M. & W. 210; *Burleigh v. Stott*, 8 B. & C. 36; *Price v. Edmunds*, 10 B. & C. 578; 6 Price, 611.

J. Duggan, contra, cited *Price v. The G. W. Railway Co.* 16 M. & W. 242; *Thompson v. Wilson*, 1 U. C. C. P. 57; *Bell v. Banks*, 3 M. & G. 258; *Byles on Bills*, 181 and notes; *Thimbleby v. Barron*, 3 M. & W. 208; *Ashbee v. Pidduck*, 1 M. & W. 567; *Brown v. Wilkinson*, 13 M. & W. 14; *Isaac v. Daniel*, 8 Q. B. 500.

McLEAN, J.—The contract declared upon is absolute in its terms, the defendants jointly by their acceptance promising to pay the bills of exchange respectively at maturity and standing precisely in the same position as if they were joint makers of so many promissory notes for value. Anything which would in law discharge the one, would equally discharge the other of the defendants; and unless both are discharged, neither of them can be so; for the undertaking, being a joint one, must stand or fall as such,

and cannot by any subsequent act or process be converted into a several contract. No action could be maintained on the bills of exchange, except against both of the acceptors; and an agreement to give time to one, was in effect an agreement to extend the time of payment to both. This is not the case of a drawer or indorser, who might complain and claim exemption from the payment on account of time being given to the acceptor. In the latter case the drawer and indorser would stand in the position of sureties only, on the face of their bill; the acceptor would be primarily liable to the holder; and if the drawer or indorser were compelled to pay in consequence of the acceptor's default, an action could be maintained against him; or if the indorser paid the bill, he might call upon the drawer, who again would have his remedy against the acceptor; but if time were given to the acceptor by the indorser, he could not subsequently compel the drawer to pay. In such cases the granting of time to the party who is bound to pay the bill may prejudice the parties liable in case of default, by putting it out of their power to call for payment till after the expiration of the period of indulgence; and in all cases where the granting of time may work an injury to any one other than the party primarily liable, the party so liable to be injuriously affected will be discharged. But where an instrument is signed by two or more persons, by which they become jointly liable for the payment of a sum of money, whether such instrument be a bond, or bill of exchange, or promissory note, it is not competent for any one to set up a plea that he was only a surety, and that the obligee or payee had consented to stay proceedings for a time, on receiving an assignment of property, or on an assignment being made to any one else in trust for all the creditors of the assignor. The obligee or payee might hope to receive the debt from the proceeds of property assigned, and might be willing to await the result of the assignment; but in doing this he does not place the parties in any worse situation than they were previously, and they have no right to complain of a delay which does not injure them. In this case, John Soules alleges that William D. Soules, for whom

he alleges he was security, was in insolvent circumstances ; and that he made an assignment to Charles Lord Helliwell, by which he granted, bargained, sold, assigned, and transferred unto the said Charles Lord Helliwell all and singular the stock in trade, debts, books of account, bills, notes, and all other personal estate and effects whatsoever, or where-soever situate, upon trust, to pay and apply the proceeds thereof ratably amongst the creditors ; and that plaintiff was a party to that assignment, and thereby agreed not to sue the assignor for nine months ; and that if he did so, the agreement should operate as a discharge. John Soules endeavours to get rid of his undertaking by shewing an arrangement with William D. Soules, his co-contractor, which could not possibly prejudice him. All the personal estate and effects of William D. Soules were assigned to a trustee, and the plaintiffs consented to receive a ratable proportion of their demand in part payment of their debt, not in discharge of the whole ; and such proceeding must evidently be beneficial rather than injurious to John Soules, inasmuch as the amount of liability would be reduced by the amount to be received from the estate : if all were paid, then John Soules would be wholly relieved ; if only part, then his liability for the insolvent would be diminished ; and even for that he could not be sued for a period of nine months from the date of the assignment. The remedy on the bill was not wholly relinquished ; it was only stipulated that it should not be enforced for nine months. At the expiration of that period, the bill stood precisely as before the assignment, liable to be enforced against both the acceptors, and any balance to be collected from either. If the acceptor of a bill or maker of a note have become bankrupt, the holder may, without the assent of the other parties, prove the bill under the commission, and receive dividends, and will not thereby discharge the other parties to the bill from their respective liabilities to him (a). So the circumstance of one of the parties to a bill having been charged in execution and discharged as an insolvent debtor, does not

(a) Chitty on Bills, 421, Amer. ed. ; 4 Bing. 719 ; 1 T. R. 169 ; 2 B. & P. 61 ; 3 B. & P. 363 ; 2 D. & R. 337 ; 7 Bing. 508.

preclude the holder from proceeding against other parties. But if the holder of a bill compound with the acceptor or other party, without the consent of the drawer or other subsequent parties, he thereby releases them from their liabilities, if they had effects in the hands of the acceptor or prior indorser; for there is a material distinction between taking a sum of money in part satisfaction of a debt—as in case of a dividend by compulsion of law under a commission of bankruptcy, or a discharge under the Insolvent Act—and the voluntarily taking a sum in satisfaction of such debt where the party has an option to refuse less than the whole, but compounds with the acceptor, and thereby releases and deprives all other parties to the bill of the right of resorting to him. In this case, however, defendant John Soules, if in fact a surety, is deprived of no right which he had; and his right to recover against William D. Soules any money which he may be obliged to pay on the joint acceptance cannot be defeated or affected in any way by the agreement which he sets up as entitling him to a discharge. That right does not arise on the instrument, as in the case of the drawer or indorser of a bill of exchange or promissory note. It is not pretended that defendant John Soules is discharged by reason of the assignment made by William D. Soules, to which the plaintiffs were parties, or on any other ground than that the giving of time to a debtor without the consent of the surety will in general discharge the surety. But here John Soules does not appear on the bill in the position or character of a surety, and it is only by parol evidence that such can be established. Such evidence, however, would in effect vary the terms of the bill, by making it a bill accepted by one of the defendants as principal, and by the other as surety, though on the face of it accepted by both as principals, and therefore would be inadmissible. The defendant is therefore estopped from setting up a defence which can only be supported by allowing parol evidence to vary or contradict the terms of a written instrument. In the case of *Ashbee v. Pidduck* (a), which was an action on a bond against two surviving

(a) 1 M. & W. 564.

obligors, after the executor of a third obligor had been released, it was held, that where three persons had entered into a joint bond, and it did not appear either on the bond or condition that two of them were sureties for the other, that a release given by the obligee to the representative of a deceased obligor was no answer to an action against the surviving obligors. Lord Abinger, C. B., says, "How does it appear that these defendants were sureties? It does not appear from the condition of the bond that they were so, and you cannot, as against the obligee, shew that they were. So in this case the acceptance is joint: each of the acceptors is answerable, and neither of them can shew, as against the drawer, that he was only surety. That the terms of a bill cannot be varied by agreement, nor by any contemporaneous oral contract, has been frequently decided in our own courts in this province. The cases *Durand v. Stevenson*, 5 U. C. Rep. 336; *Brooke v. Arnold*, 2 T. R. 25; *Hart v. Davy*, 1 U. C. Rep. 218, and many cases in *East's Reports*, establish this point; and in the case of *Davidson v. Bartlet et al.*, 1 U. C. Rep. 50, which was in all respects the same as this, except as to the assignment, the court held that one of the joint makers of a promissory note cannot plead that he made the note, with the plaintiff's knowledge, only as a surety for the other maker, and that the plaintiff gave time to the other maker without his knowledge or consent, and that he was thereby discharged. These authorities shew clearly that the pleas are bad, and judgment must therefore be for the plaintiff.

SULLIVAN, J.—It will perhaps be better in the first place to dispose of the question secondly raised in the special demurrer—can defendant John Soules, who is a joint acceptor, be heard to say (as between himself and the plaintiffs) that he was a surety for the other acceptor, and is thereby discharged by time being given to his principal?

Byles on Bills, 5th Ed. 181—"Where, of a joint and several note, one maker is in reality principal and the other surety, it is doubtful whether in any case evidence is admissible at law to shew that one is principal and the

other surety, and consequently that the surety is discharged by time given to the principal."

After citing the authorities up to the time of the fifth edition, in note *c. p.* 181; *Price v. Edmunds*, 10 B. & C. 578; *Perfect v. Musgrave*, 6 Pri. 111; *Clark v. Wilson*, 3 M. & W. 288, and others, the following conclusion is arrived at; to which, after examining the authorities referred to, I have only to express my assent: "The authorities are contradictory, but on principle it should seem that at law at least such evidence is inadmissible as against the creditor; for it is parol evidence to make a written contract conditional which on the face of it is absolute. The evidence does not shew want of consideration, as in the case of an accommodation acceptance."

This is in accordance with the rule that the acceptor is at law always considered the principal debtor.—*Price v. Edmunds*, 10 B. & C. 578; *Harrison v. Courtland*, 3 B. & Ad. 41; *Henton v. Pocock*, 5 Taunt 192. In a very late case—*Besant v. Cross*, 20 L. J. N. S. C. P. 173; 5 Eng. Rep. L. & Eq. 389.—a judgment signed as for want of a plea was upheld; the plea attempting, by parol evidence, to alter the nature of an acceptance.—See also *Adams v. Wordly*, 1 M. & W. 374; *Ashbee v. Pidduck*, 1 M. & W. 567. It appears to me to be clear law at the present time, that the fact of any relation of principal and surety between joint makers or joint acceptors, cannot be set up as against drawers, payees, or indorsees, whose rights depend upon the bill or note itself. This, however, does not dispose of the case, if the pleas under consideration, or either of them, contain a good defence, taking the two defendants as joint contractors, and without regard to any relation of principal and surety.

The merely allowing the debt to lie over, would not only not discharge a joint acceptor, but it would not discharge a drawer or indorser. But if the payee once destroy or suspend, or contract to destroy or suspend, his right of action against the acceptor, the drawer and indorser are at once discharged. *Byles on Bills*, 182—A general covenant not to sue, for that will ensure as a release, a written or verbal

agreement, on good consideration, not to sue the acceptor at all, or not to sue him within a limited time, discharges the indorsers ; but if such agreement be without consideration, or otherwise void in law, the indorsers are not discharged. Byles, 182, and notes—This, I think, is on the ground of the peculiar relation of principal and surety, which requires that the creditor should not enter into any agreement capable of being enforced by action, to stay his hand in seeking his remedy against the principal, even for a time. But in the case of two or more principal debtors, or of principal or surety where they are both jointly liable, then a *discharge* to one by the creditor, as by releasing him, or taking from him a composition, and erasing his name from the note, will be a discharge of the other ; but the discharge does not in this case proceed upon the law of principal and surety ; but upon a well-known principle, said to be founded on indisputable law, that a creditor's discharge of one joint and several debtor is a discharge of all. *Chatham v. Ward*, 1 Bos. & Pul. 630—This was the case of the appointment of a joint and several obligor as executor of the obligee, and it was held on old authority that both obligors were discharged. The case even goes further ; for Roche says, “The general principle is, that if the cause of action is once *suspended* in the case of a single obligor, it is gone for ever. The obligee has it not in his power to discharge one obligor without discharging the other.” See also *Rex. v. Hargraves*, Co. Lit. 2646. In *Nicholson v. Revel*, 4 Ad. & El. 675, the discharge of one joint and several maker of a promissory note was held to be a discharge of the other makers.—*Thorn v. Smith*, 20 L. J. N. R. C. P. 71 ; Eng. Rep. L. & Eq. 2, 301.

But according to *Thimbleby v. Barron*, 3 M. & W. 242, a covenant not to sue for a limited time is not pleadable between the debtor and creditor in bar in an action for such debt, and the distinction seems to have been taken at an early time.—1 Rolls, Ab. 939 ; *Ayloff v. Swamshire*, Carth. 63 ; S. C. 1 Show. 46. If, then, in a case of a covenant not to sue for a limited period, if the cause of action, as between the creditor and the covenantee, be not suspended, and the

remedy of the latter be only to sue for damages (Lord Abinger, 3 M. & W. 215), and there being no relation of principal and surety between the joint debtors, which the creditor is bound to notice, what would not be pleadable by the covenantee in his own case, cannot be so by his joint or fellow debtor in his case.

It would follow, then, that the first of these sets of pleas, setting out an agreement, with a good and valuable consideration, not to sue within a limited time, is not good, and the judgment must be against these pleas.

The second set of pleas goes further ; and after setting out the covenant not to sue for a limited period, also sets out a stipulation under seal, that in case any action should be brought within the period, the said defendant William Soules should be forever discharged from the said debt.

In the American note to *Thimbleby v. Barron*, 3 M. & W. 216, an American case is cited (*White v. Dingley*, 4 Mass. 463) to this effect : "When the agreement not to sue for a limited period contains a condition of discharge in case of its violation, it will be a bar."

And so I should think it would be if there were violations of the covenant or agreement not to sue, for then would come in the discharge. As regards the person with whom the stipulation not to sue him is made, the bar could not well arise after the limited time ; and if he be not discharged, how can his co-debtor be so ? It is not the case of the principal and surety : the obligation of the latter is to pay in default of his principal, and he has a right, arising out of their peculiar relation, that the creditor shall not disable himself to recover from the principal for even a limited time. But when the obligations of the two joint debtors are coequal, the undertaking not to sue the one within a limited time is no conceivable disadvantage to the other : he can discharge himself of his obligation by payment, and his right to claim contribution is in no way postponed by the undertaking of the creditor not to sue, or by the proviso that if he do sue, the suit shall cause the agreement to operate as a discharge.

There seems, however, to be a more simple answer, in

this case, to the defence, if the decision in the case of *Lacy v. Kinnaston*, Lord Raym. 688,* be not overruled. It is directly to the point that a covenant never to take advantage of a covenant made with several of the covenantors of the former, is no release or discharge to any. A perpetual covenant not to sue operates as a release for the mere purpose of avoiding a circuity of action, not because it is in its nature a defeasance. "If A. be bound to B. in a bond, &c.; B. covenants never to sue A.; this will be a bar in debt brought upon the bond. But if A. and B. be jointly and separately bound to C., C. covenants never to sue A., this is no defeasance." The case of *Lacy v. Kinnaston* was that of a covenant to save harmless one covenantor from a joint and several covenant. *Hutton v. Eyre*, 6 Taunt. 289, is the case of a covenant to one of the two *joint* debtors by simple contract not to sue him, and the same rule is held to apply. In this respect there is no difference between a joint covenant or obligation and a joint and several one. A release of one of the covenantors or obligors would be a defeasance as to all, which of course would not be the case if the obligation were several, and not joint and several. Lord Kenyon, in *Dean v. Newhall*, 8 T. R. 168, mentions *Lacy v. Kinnaston* as authority beyond all doubt. See *Platt on Covenants*, 594.

I do not think the last objection, made on special demurrer, good—namely, that the pleas do not shew the plaintiff to have been the holder of the bills when the composition took place. A person may covenant not to sue upon an instrument or debt which is not yet his, but which afterwards comes to him, as upon a debt presently owing to him. But, as I think the pleas demurred to plainly bad in substance, there is no necessity to consider this special objection any further.

Judgment for the plaintiff on demurrer.

HUFFMAN V. ASKIN.

Fact alleged not traversed does not dispense with proof.

Where a material fact alleged in pleading is not traversed by the subsequent pleading, it is not therefore admitted *as a fact* so as to dispense with proof of it before the jury.

To a plaint in dower the defendant pleaded, secondly, that the husband of demandant, by an indenture, to which she was a party, conveyed the land in question to one A. B., and that demandant, on, &c., appeared before C. D., one of the judges of her Majesty's Court of Queen's Bench, who examined her, and that she barred her dower to the said land, and that the said judge certified on the back of the said indenture, &c.

The demandant replies that she ought not to be barred from recovering her dower in the premises in the second plea mentioned, because she says she did not give and acknowledge her consent to be barred of her said dower in manner and form as by the said tenant alleged.

Per Cur.—That, on these pleadings, it could not be held, from the state of the record, that the demandant had given her consent before a judge to be barred of her dower, according to law.

Dower.—The demandant claims as the widow of Jacob Huffman from the defendant dower in ten messuages, ten barns, ten stables, four gardens, four orchards, two hundred acres of arable land, two hundred acres of meadow land, and two hundred acres of wood land, with the appurtenances, situate in the township of Trafalgar, in the county of Halton, of the endowment of the said Jacob Huffman deceased, heretofore her husband.

1st plea.—That Jacob Huffman, heretofore the husband of the demandant, was not, on the day on which he married the said Elizabeth Huffman, or ever after seized of such estate of and in the said messuages, lands, and tenements, with the appurtenances, or any or either of them or any part thereof, that he could endow the said Elizabeth Huffman thereof, and of this defendant puts himself upon the country.

2nd plea.—As to north-west half of No. 20, in the second concession north of Dundas street, the plea is thus: “And for a further plea to *the lands and tenements, with the appurtenances in the plaint mentioned*—that is to say, to the north-west half of that certain parcel of land, being lot No. 20 in the second concession north of Dundas street, in the township of Trafalgar, the tenants says that the said demandant ought not to have her dower of the endowment of the said Jacob Huffman deceased, heretofore her husband, of and *in such part of the land and tenements, with the appurtenances, in the said plaint mentioned, as are above in this plea mentioned*, because he says that the said Jacob Huffman in his lifetime and during his intermarriage

with the demandant was seized of the lands and tenements in this plea mentioned in his demesne as of fee, and being so seized afterwards and during the said intermarriage—to wit, on the 28th day of April, in the year of our Lord, 1815—by a certain indenture then made between the said Jacob Huffman and Elizabeth his wife the demandant of the first part, and one James Finch of the second part, which said indenture is lost and destroyed by time and accident, he, the said Jacob Huffman, in consideration of a large sum of money—to wit, the sum of 75*l.* of lawful money of Canada—to him paid by James Finch, did grant, bargain, sell, &c., unto the said James Finch, his heirs and assigns, the lands, and tenements in the introductory part of this plea mentioned: that the said demandant, in and by the said indenture, did then remise and release unto the said James Finch, his heirs and assigns, all dower which she the said demandant, in the event of her surviving the said Jacob Huffman, should, might or could have of and in the lands and tenements in this plea mentioned; and the said tenant further saith that the said demandant, on the day of execution of the said deed—to wit, on the 28th day of April, in the year 1815, and the day of the date of the certificate herein mentioned—personally appeared before the Honorable William Campbell, one of the judges of the then Court of King's Bench, in and for the Province of Upper Canada—to wit, at the then town of York—who then and there duly examined the said demandant touching her consent to be barred of dower in the lands and tenements, with the appurtenances, in the said indenture and in the introductory part of this plea mentioned; whereupon the said demandant did then and there, in the presence of and to the said judge, give and acknowledge her consent thereto to be barred of dower as aforesaid; and it then and there appearing to the said judge that such consent was free and voluntary by the said demandant, and not the effect of any coercion or fear thereof on the part of her said husband or any other person, the said Judge did then and there, according to the form of the statute in that case made and provided, grant a certificate, and did certify on the back of the said indenture that

the said demandant did personally appear before him the said judge as aforesaid, and being duly and openly examined by him as such judge, touching her consent to be barred of dower of and in the said lands and tenements in the said indenture mentioned and above in this plea mentioned, and did give her consent freely and voluntarily, without coercion or fear of coercion on the part of her husband, the said Jacob Huffman, or any other person whomsoever, and did then and there sign the said certificate as such judge as aforesaid—to wit, at York, now the city of Toronto. And the tenant further saith, that the said Jacob Huffman was not at any time after the execution of the said indenture and of the certificate as aforesaid ever seized of the said lands and tenements, or any of them in this plea mentioned, that he could endow the said demandant thereof, and this the said tenant is ready to verify; wherefore he prays judgment if the said demandant ought to recover her dower of and in the lands and tenements in the introductory part of this plea mentioned of the endowment of the said Jacob Huffman.

Replication—That demandant ought not to be barred from recovering her dower in the premises in the second plea mentioned, because she says she did not give and acknowledge her consent to be barred of her said dower, in manner and form as the said tenant has in his said second plea alleged—concluding to the country.

This cause was tried before Mr. Justice Draper, at the last spring assizes at Hamilton, when a patent from the crown for the whole lot No. 20, in the second concession north of Dundas street, in the township of Trafalgar, to Jacob Huffman, of the township of Glanford in the County of York, yeoman, son of Christopher Huffman, a U. E. loyalist, dated the 30th October, 1809, was put in.

John Huffman, a son of the patentee and of the demandant, was then called, and proved that the patentee died on the 4th of May 1851: that he did not die in possession of any part of the land, but that he lived upon it during coverture with demandant: that he left the property entirely twenty-five or twenty-six years ago, and part of it as much

as thirty-four years ago. On cross-examination, he stated that his father had some clearance on the north-west half of the lot, but that he never moved on to that part: that he was aware that his father had conveyed that half of the lot to one Finch about 1815, who moved on to it and lived on it: that there were ten or fifteen acres cleared and a house on that part conveyed to Finch.

The demand for dower in the whole lot served on defendant was proved.

For the defendant no witnesses were called, nor was any testimony adduced.

The tenant's counsel contended that the second plea limits the demandant to the north-west half, and that no verdict can be rendered against defendant with regard to more: that the defence being limited to that, the recovery should be on that issue limited also, and that the traverse in the replication being only as to *her consent*, and the judge's certificate of her consent being expressly admitted, that is sufficient evidence of the consent, and entitles the defendant to a verdict on that issue.—37 Geo. III ch. 8; 48 Geo. III. ch. 7.

Mr. *Read* tendered a certified copy of a memorandum, which was rejected as evidence, but put in for the information of the court in term.

The learned judge was of opinion that both points were against the demandant. 1st—That she is limited on the record to a demand of dower in the north-west half. Next—That in the absence of any evidence to rebut the judge's certificate (and he doubted whether he could receive such evidence, unless to prove an imposition practised on the judge, or some such fraud), the certificate stated in the plea and not traversed is evidence for the defendant sufficient to defeat the replication. He then directed a verdict for the defendant, reserving leave by consent to demandant to move on both points to enter a verdict for her.

In Easter term last a rule *nisi* was obtained, calling on the tenant to shew cause why the verdict rendered for him at the last assizes should not be set aside and a verdict entered for the demandant, or why the said verdict should not be set aside and a new trial had between the parties

the said verdict being contrary to law and evidence, and for mis-direction of the learded judge who tried the cause, and on grounds disclosed in affidavits filed.

Cause was shewn by *A. Wilson*, Q. C., who contended that the examination of the demandant before a judge for the purpose of being barred of dower, and the certificate of the judge of her consent being admitted on the record, the demandant is estopped from asserting a right to dower, and that by the plea the burden of proof is thrown upon the demandant: that the demandant is limited by the second plea, and having gone down to trial upon the issue as to her consent before a judge to be barred of dower according to law, cannot claim dower in any other premises but those mentioned in that plea; and that if she intended to do so she should have new assigned, shewing other premises in which she claimed a right of dower. As to the necessity of a new assignment, he cited the cases of *Cameron v. Lount*, 4 U. C. Reports, 277; *Montprisatt v. Smith*, 2 Camp. 175; *Rogers v. Constance*, 1 Q. B. 83; *Harper v. Williams*, 4 Q. B. 230. And as to what is admitted by the plea—*Bingham v. Stanley*, 2 Q. B. 117; *Robins v. Maidstone*, 4 Q. B. 811; *Fearn et al. v. Filica*, 7 M. & G. 513; *Carter v. James*, 13 M. & W. 137; 13 Jurist, 213 & 1012; 14 Jurist, 715.

M. C. Cameron supported the rule, and urged that the defendant has filed two pleas, the first traversing the demandant's right to dower generally in the premises, and the other setting out a release of dower as to a particular portion: and that, even if the demandant failed upon the the issue on the latter plea, she would be entitled to a verdict upon the issue to the first plea, on proving her late husband's right to other premises than those in which the dower had been barred or released: that the allegation that a certificate was granted by the judge shewing demandant's consent to be barred of dower, is not one which it was necessary to traverse, as it was a matter of evidence: that the judge's certificate should have been produced, and when produced it would establish *prima facie* a relinquishment of dower and throw upon the demandant the onus of proving fraud or something else to get over the difficulty. He objected to the

judge's certificate as stated in the plea, on the ground that the demandant had not been examined apart from her husband, as required by the statute. In support of his argument he cited *Edmunds v. Groves*, 2 M. & W. 642; *Fearn v. Filica*, 7 M. & Gr. 517, 18; *Smith v. Martin*, 9 M. & W. 308.

McLEAN, J.—It is clear, I think, that the second plea sets up the release of dower in a part only of the premises mentioned in the plaint. The plea alleges that the demandant ought not to have her dower of the endowment of the said Jacob Huffman deceased, heretofore her husband, of and in *such part* of the lands and tenements, with the appurtenances, in the said plaint mentioned, as are above in this plea mentioned, and the part above mentioned consists of the north-west half of No. 20, in the second concession north of Dundas street, in the township of Trafalgar. The plea as to that half alleges that certain proceedings took place by which the demandant became barred to her right to dower; and, as her consent to such proceedings was essential to give them any validity, she traverses the fact alleged of her having given such assent before a judge in manner and form as the tenant has alleged. Supposing, for the sake of argument, that all the facts stated in the second plea must be taken as admitted by the demandant, the effect would be to establish a *prima facie* case in favour of the tenant as to the demandant being barred of her dower in the particular part of the premises specified in that plea, and as to that part she could not recover. By her claim for dower which was served on the tenant, she asserts a right in the whole of lot No. 28 in the second concession north of Dundas street, as the widow of Jacob Huffman, and by the first plea the tenant denies such right in any of the premises mentioned in the plaint, alleging that Jacob Huffman was not seized at the time of his marriage with the demandant, or at any time since, &c. The patent for the whole lot to Jacob Huffman, bearing date the 31st October, 1809, was put in, and it was proved that he lived on it during his coverture with the demandant: that he left a part of the lot about thirty-four years ago, and the residue twenty-five or twenty-six years ago: and that he died only a year ago last May. The seisin of the demandant's

husband is clearly established in the whole lot; and her marriage being admitted, she is entitled to dower in the whole, unless her right has been barred in the mode prescribed by law. The defendant contends that because all the facts stated in the second plea are not traversed, they must be taken as admitted on the record against the demandant, and that the demandant is by such admission estopped from denying that a certificate was given by a judge as stated in the plea, which certificate amounts to *prima facie* evidence that the demandant was legally barred of her dower in the premises mentioned in the second plea, and throws upon her the onus of proving fraud, or something which will avoid the effect of such certificate. The demandant has, however, traversed a material fact alleged in the plea, on which every thing must depend—viz., her alleged consent to be barred of dower in the premises. On this fact the tenant has taken issue, and as he has stated the fact affirmatively, the burden of its proof is thrown upon him. He then says that the granting of a certificate by a judge being admitted, that is *prima facie* evidence upon the issue, and throws upon the demandant the necessity of rebutting it. The tenant would thus be supporting an important issue taken upon a fact stated in his plea by another portion of his own plea; and this I think he cannot do. The issue must be supported in the same manner as any other issue, by evidence. In an action of assumpsit, the plea of payment impliedly admits a debt to have been due, but such admission cannot be taken as evidence upon an issue of non-assumpsit. The tenant did not in this case produce any certificate such as he sets up in his plea, and with respect to which he has taken issue; but relied upon the record for proof of its existence and of the facts stated in it—though one, the most important of such facts, is distinctly traversed and forms the subject of issue. He did not attempt to account in any way for the certificate on which he relied; and has failed, I think, by sufficient proof to establish the issue in his favour. The case of *Smith v. Martin*, 9 M. & W. 304, appears to establish that where a material fact alleged in pleading is not traversed by the subsequent pleading, is not therefore admitted as a fact so as to dispense with proof of it before a jury; and in the

case of *Fearn v. Filica*, 7 M. & G. 518—*Cresswell, J.*, referring to the cases of *Edmunds v. Groves*, 2 M. & W. 642; and *Benion v. Davison*, 3 M. & W. 179; and the opinion of Baron Alderson in these cases, says: "If the rule is not as stated by Alderson, B., this singular state of circumstances arises: a counsel might ask the jury, from the mere state of the record, to infer a fact which was directly in issue." The singular state of circumstances supposed by Mr. Justice *Cresswell* is precisely the present case. The jury was asked to infer, from the state of the record, that the demandant had given her consent before a judge to be barred of her dower according to law, a fact which was directly in issue. The cases *Chanter v. Leese*, 4 M. & W. 295; *Robins v. Maidstone*, 4 Q. B. 811; *Carter v. James*, 13 M. & W. 137; *Edmunds v. Groves*, 2 M. & W. 642; shew how far material allegations on the record, not traversed, are to be taken as admitted for the purpose of a cause.

There appears to have been some difference of opinion on this point between the Court of Queen's Bench and the Court of Exchequer in England—the former in the case of *Bingham v. Stanley*, 2 Q. B. 117, dissenting from the doctrine laid down by the latter in the case of *Edmunds v. Groves*, 2 M. & W. 642. My opinion however is, that a jury cannot be called upon to infer from anything on the record which contains the issue which is to be tried, that such issue is to be found either for plaintiff or defendant, and that such issue must be supported by testimony, other than that to be gathered from the record. As no such testimony was adduced in this case, and the right of the demandant to dower has been clearly established, I think she is entitled to have a verdict entered for her, and that the rule in this case must be made absolute.

SULLIVAN, J., concurred.

Rule absolute.

BRUNSKILL V. METCALF AND FORBES, SURVIVING PARTNERS
OF WILSON, DECEASED.*Parol assignment of goods—Accord and satisfaction.*

The defendants admit the plaintiff's demand, but set up as a bar to the further continuance of the action, an agreement, which they allege was entered into between them and their creditors, the plaintiff being one, by which the creditors agreed to take certain property and contracts in which the defendants were interested, which were to be managed by assignees appointed by the creditors; that they were ready and willing to make such assignment, but that at the time of pleading sufficient time had not been allowed to complete the same;—the plaintiff treating this plea as good, replies that he and the other creditors did not mutually agree with each other and with the defendants to take the assignment, &c. therein mentioned as a composition for, or a satisfaction of their respective debts, nor was it agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt.

Held, per Sullivan, J.—That a composition where lands are not concerned, or an assignment of goods which would not fall within the Statute of Frauds, is valid by parol; that it is no objection to the accord set up in this case that the satisfaction had not been given at the time of the plea pleaded: that an agreement as an accord to which all the creditors are parties is good, if there be no other fatal objections, notwithstanding that it is by parol, and notwithstanding that acceptance is not shewn, there being no default on the part of the debtors: that the plea after verdict must be held good, because it is in the nature of the circumstances set forth that the mutual promises were (provisionally) a satisfaction for the debt.

This is an action of assumpsit in which the plaintiff declares upon a promissory note made 23rd September, 1851, made by the defendants and Wilson in his lifetime, by the name and style of Metcalf, Wilson, and Forbes, payable to the plaintiff at the Branch Bank of Montreal, in Toronto, four months after date, for 101*l.* 15*s.* 5*d.*

2nd count is on a promissory note, dated 10th November, 1851, made as the first note, payable to the plaintiff at the same place as the 1st note, three months after date, for 131*l.* 16*s.* 7*d.*

3rd count is on a promissory note, dated 14th November, 1851, made as the former notes, payable to plaintiff or order, at the same place, three months after date, for 206*l.* 19*s.* 9*d.*; on which the usual breach is assigned,

On the 23rd of March, 1852, the defendants plead to the further continuance of the action, because they say that after the making of all the said promises in the said declaration mentioned, and before and up to and until the commencement of this suit—to wit, up to and until the suing out of the said writ in this cause—the said defendants were indebted to the plaintiff in a large sum of money—to wit, the sums of money and causes of action mentioned in the declaration in this cause; and to numerous and divers

other persons respectively in divers large sums of money, and became and were in bad and embarrassed circumstances and unable to pay or satisfy the plaintiff and the said other creditors of the defendants respectively their debts in full, whereof the plaintiff and the said other creditors had notice ; and therefore at a meeting of the creditors of the defendants, held, to wit, on the 20th March, 1852, (at which meeting the plaintiff was in his proper person present and concurred therein,) it was resolved, agreed upon, and determined by and between the plaintiff and these defendants' other creditors and these defendants, that the said defendants should assign to the Bank of Upper Canada, one of the creditors of these defendants, the contract for the erection and completion of the Cathedral Church in the city of Toronto, and the machinery and implements belonging thereto and used therewith, in consideration of the said Bank discharging these defendants from all liabilities under the said defendants' contract to build and complete the said church ; and from a large sum of money—to wit, the sum of 1450*l.* of lawful money—due and owing from these defendants to the said Bank ; and further, that the sureties of these defendants for the erection and completion of the contract by the said defendants should be discharged from their liabilities, all of which the said Bank agreed to and accepted, and of which the said plaintiff and other creditors had notice, and to which they assented and agreed,—and therefore these defendants offered and agreed to, and with the plaintiff and them the said defendants' other creditors, to make and execute a conveyance of all their other estate and effects and contracts other than the said church to one George Bilton of the city of Toronto, merchant, and one James Leishman of the said city of Toronto, merchant, two of the creditors of these defendants as assignees of the said last mentioned estate, and in trust for the benefit of plaintiff and other creditors aforesaid, and to pay the proceeds arising and realized from the said trust to the said plaintiff and other creditors share and share alike ; that these defendants were to devote such of their time, skill, industry, and service as the assignees might from time to time require towards the full completion of the said

contracts, and that the said plaintiff and the said defendants' other creditors should discharge the said defendants from their liabilities, which the said plaintiff and the said other creditors respectively, had against and upon these defendants; and therefore these defendants and the said other creditors mutually agreed with each other to accept and take the said conveyance of the said estate and as aforesaid as a composition for and in full satisfaction of their respective debts in full; and the said defendants further aver, that they were ready and willing to make and execute such a conveyance as would carry out the said arrangements; and these defendants further say that sufficient time has not been yet afforded to these defendants to make and perfect the same and carry out the said agreement, from the time of the making of the said agreement—to wit, the 20th day of March, 1852—up to and until the making of the said plea; then defendants further averred that in the meantime the said plaintiff and the said other creditors of these defendants were not, nor was any of them, to proceed against the said defendants for the recovery of their respective debts; and these defendants further averred that the other creditors of these defendants have refrained from taking any proceedings at law to recover judgment for their respective demands and claims upon these defendants, in good faith and under the belief that the said plaintiff would carry out the said agreement for the equal distribution of the entire estate and effects of these defendants, ratably as aforesaid. This plea concludes with a verification and a prayer for judgment, if the plaintiff ought further to maintain, &c.

The plaintiff replied, that he and the said other creditors did not mutually agree with each other and the defendants to accept, or take the conveyance therein mentioned as a composition for or in satisfaction of their respective debts, nor was it agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt, *modo et forma*, and of this the plaintiff put himself upon the country, &c., and the defendant joins issue.

The plaintiff, on the 30th of March, 1852, obtained an order from Mr. Justice Sullivan, for a writ of trial of the issue now joined, and the issue came to be heard before Mr. Harrison, the judge of the County Court of the United Counties of York, Ontario, and Peel.

At the trial, the notes were produced, the plaintiff's counsel claiming the right to begin, which was accorded to him; then one of the defendants was called on behalf of the defendants, who deposed as follows:—"My firm consists of Metcalf and Forbes; we were notified to attend a general meeting of creditors—twenty-eight or thirty attended—about the 17th or 18th March; I was present; also the plaintiff; we went into consideration of affairs; a resolution was put and carried by the creditors present; the resolution was in the following words:

"Proposed by Joseph Lee, seconded by Alexander Manning, — That a committee, consisting of Mr. Ben. Field, Thomas Brunskill, Thomas Burgess, and George Bilton, be appointed to investigate the affairs of the firm of Metcalf & Forbes, and make their report to a meeting of creditors on Friday next, at seven o'clock, at Elgie's Hotel."

Witness and plaintiff were on committee with others; committee sent plaintiff to the Bank of Upper Canada to negotiate, and said (creditors) would take 5s. in the pound, if the Bank of Upper Canada would take charge of the estate. The bank agreed to take the church for their claim, and the plaintiff thought it was the best that could be done. The committee put in writing a report drawn up by the plaintiff, and I think signed by Bilton as chairman of the committee. The plaintiff took away some papers afterwards; it arose from some disagreement, plaintiff wishing to be sole assignee; creditors wished Burgess and Bilton to be assignees. This was after report was presented to creditors at a general meeting, I think on 19th March; at all events in the evening. Plaintiff said on that day, that unless he was sole assignee, he would not have anything to do with it. Then it was proposed that Leishman and Bilton should be assignees. Plaintiff next morning said he had consented to act as assignee, and on the evening of that same day there was another meeting, at which the plaintiff was

present. The resolutions produced, were carried on the 20th. (They appear to be as follows:)

“Moved by Mr. Manning and seconded by Mr. Bescoby,—That a committee, consisting of Mr. Field and Mr. Brunskill, be appointed to carry into effect the arrangement proposed by the Bank of Upper Canada, viz., of assigning the cathedral contract, including the machinery and implements employed on that job, on the Bank relieving Metcalf & Forbes of their liability to the Bank and their sureties.—Carried.

(Signed), “JOSEPH LEE, Chairman.”

“Toronto, March 19th, 1852.”

“Moved by Mr. Field, seconded by Mr. Burgess, in amendment to the amendment of Mr. Brunskill—That the names of Mr. Lee and Mr. Brunskill be stricken out, and those of Mr. Bilton and Mr. Leishman inserted.—Carried.

“Toronto, March 20th, 1852. “JOSEPH LEE, Chairman.”

[NOTE.—The three resolutions above copied, are all that were returned with the record.]

“The plaintiff did not assent to the resolution of appointment of assignees because he was not there; he went away, and said *he would leave it* to the meeting to decide, and he would abide by the result of the vote.” Cross-examined: “There were four meetings altogether; the plaintiff was present at all. I believe he was present when the resolution was produced, but not when put from the chair. I believe an assignment has been drawn up, but I do not know whether signed or not. Plaintiff did not say he would come into the assignment; he said he was prepared to act if he was assignee with any other creditor. When plaintiff went away, he said he would be back in a few minutes.” Re-examined: I think plaintiff has got report of the committee and other papers; when he went away, he took some papers away in his hat.” Again cross-examined: “I am not aware that there was any resolution that a composition should be taken, or that creditors should not sue; but it was so understood as I believe by all. The arrangement with the bank was advantageous to the creditors. I think that the original resolution was that the four committeemen should be assignees. The first amendment was, that the plaintiff and Lee should be assignees, and the second amendment produced was moved on the first amendment. It was

unanimously agreed to. The report of the committee was drawn up in plaintiff's office ; at the time the report was prepared, plaintiff did not refuse to come into the assignment, but he did say that he would not exactly say that he would.

George Bilton (also for defendants, deposed) : " At a meeting of the creditors, there was a resolution in writing put and carried when plaintiff was present, to the effect of assigning all the estate, except the church, to pay ratably. It was understood creditors were not to sue. The plaintiff was present, and appeared to assent. The plaintiff was appointed one of the committee ; when the plaintiff went away, I urged him to remain until the vote ; he said he would abide by the result of the vote ; he took away the report of the committee and a resolution ; I applied for them personally, and sent also." Cross-examined—" The resolution was one passed by the creditors at a meeting ; I do not know what it was ; there was a written resolution that the defendants should assign all estate except the church to the creditors, and that they should take composition ; the plaintiff did say, after resolution agreed to, he wished it to be understood he did not finally agree to come in. The report was adopted by the meeting, and that was the resolution ; at a meeting for choice of assignees, some one said the plaintiff had not finally agreed to come in : he said he must come in if he was chosen an assignee. This was before he said he would abide the result of the vote as to the choice of assignees." Re-examined—" The report contained a recommendation to take an assignment, as well as the arrangement with the bank."

The then plaintiff, Thomas Brunskill, gave evidence in his own behalf. " I was present at a first meeting ; matters were referred to a committee ; I was one ; I acted with the committee ; I went to the bank to try to arrange ; the committee agreed to the arrangement ; I drew up a report recommending the creditors to arrange with the bank ; I think I took away the report, but I do not know what I have done with it ; I told the committee I would not come into any assignment ; I did not wish them to start again ; I

went to a general meeting ; I told the meeting I could not consent to be assignee with any one else ; if I did act it must be as sole assignee ; I told Crooks I did not want to be assignee, because I did not want to come into the assignment ; but I agreed to do so as sole assignee, as I expected to get commission. At the next meeting, I got up and told the meeting they might vote as they liked, but that I must distinctly wish them to understand that it still rested with me whether I came into the assignment or not."

Thomas Haworth, (for the plaintiff), creditor of defendants : " Was present at the last meeting of creditors ; heard plaintiff on that occasion say, before he left the room, that he would not act with any other person as assignee ; the plaintiff said he would go out of the room whilst they chose one. I understood him to say he would reserve to himself whether he would come in or not ; I stated to the meeting that I was under the idea that the plaintiff would not come into the assignment." Cross-examined—" I think the plaintiff, when he went away, said to the effect that he would abide by the vote : but I understood him to say, that he would reserve his coming into the assignment."

Joseph Lee, (for the plaintiff) : " When the plaintiff went out of the room the last time, he said something, but I did not exactly hear what he said ; I fully thought he would not come into the assignment ; that was my impression ; I thought he would not unless he was sole assignee." Cross-examined—" I think the plaintiff, when he went away, knew the resolution was about to be put ; he did say something about coming back."

George Bilton, recalled : " I do not recollect the plaintiff saying anything about reserving right to come into the assignment to himself ; I understood the plaintiff would come into it."

Thomas Burgess, recalled : " I do not remember it either ; the plaintiff said distinctly he would abide by the decision."

Weller, counsel for the plaintiff, objected to evidence of the parol agreement. The jury found a verdict for the defendants.

On the 10th of April last, Mr. Justice Burns, in Cham-

bers, granted a summons calling upon the defendants, their attorney or agent, to shew cause why a rule or order for a rule should not issue, returnable on the first day of Easter term, calling on the defendants to shew cause why the verdict rendered in this case, and the proceedings on the writ of execution should not be set aside, and a new trial granted without costs, on the grounds that the verdict was contrary to law and evidence, and contrary to the weight of evidence; and because of the reception of improper evidence, and for misdirection; or why the plaintiff should not have leave to enter his judgment *non obstante veredicto*, on grounds disclosed in writ of trial and affidavits and papers filed.

During the last term, *Crooks*, for the defendant, shewed cause. He argued that the trial in the inferior court was at the instance of the plaintiff. The defence set up by the plea *puis darrein continuance* was a good and sufficient defence; it was not necessary that the composition should be by deed—*Cooper v. Phillips*, 1 Crompt. M. & R. 469; S. C. 5 Tyr. 169; *Vine v. Mitchell*, 1 M. & R.; 2 Comp. M. & R. 422; *Chitty on Contracts*, title Composition.

He contended that there was abundant evidence of the plaintiff's having come into the proposed composition; that he attended the meetings and drew up resolutions; and left the meeting agreeing to do what it should agree to. The jury had a right to reject his testimony.

Hector, contra, argued that the composition for the assignment of the insolvent estate would be bad by the Statute of Frauds if real property were concerned; that it was bad so far as the bank was concerned; that institution being a corporation aggregate, and the agreement for composition if any, being by parol; that the bank, moreover, had no right to become builders—See *McDonald v. The Bank of Upper Canada*.—7 U. C. Q. B. R.; *Lyman v. The Bank of Upper Canada*. That at the time of plea pleaded no conveyance was made, and therefore no satisfaction or performance—. 16 M. & W. 181, 15 M. & W., 2 M. & S. 122, 1 Sm. L. C 146, 2 Wm. Saunders, 137, *n*, *k*.

McLEAN, J.—The plaintiff's demand is admitted by the

plea pleaded, but the defendants set up as a bar to the further continuance of this action, an agreement which they allege, was entered into between themselves and various creditors, of whom the plaintiff was one, after the commencement of this suit, by which the creditors agreed to take an assignment of various contracts and property in which the defendants were interested, which were to be managed in behalf of the creditors by assignees appointed by them; and they allege that they were ready and willing to make the assignment agreed upon, but that sufficient time had not then, at the time of pleading, been allowed to complete such assignment. The plaintiff takes issue upon this plea, treating it as a good and valid plea; and he alleges in his replication that he and the other creditors did not mutually agree with each other and with the defendants, to accept or take the assignment or conveyance therein mentioned as a composition for, or in satisfaction of their respective debts; nor was it agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt *modo et forma*.

At the trial of this issue, before the judge of the County Court, a verdict was rendered for the defendants on conflicting evidence. The plaintiff was examined, and stated that he did not agree to become a party to the assignment, on any other terms than that he should be the assignee, in which character he would be entitled to receive a commission for his services. The question on which the verdict appears to have turned was, whether the plaintiff had or had not agreed with the other creditors to accept an assignment from the defendants of their assets in satisfaction of his demand. The evidence of the defendants' witnesses, does not establish very clearly that the plaintiff did agree to accept of such assignment in any other way than by saying that he would be bound by what the other creditors should decide upon at their meeting. He was not present when the decision was made, and he states distinctly that he did not assent to the assignment; and several witnesses declare that they understood the plaintiff to reserve to himself a right to dissent from the proceedings if he were not

to be the assignee. The evidence, as taken at the trial, is not, as appears to me, of that satisfactory character that a verdict founded on it can, under the circumstances, be properly allowed to stand. There does not, however, appear to have been any misdirection of the jury on the issue joined between the parties, and a new trial can therefore only be granted on payment of costs.

SULLIVAN, J.—The doctrine that a smaller sum of money cannot be held a satisfaction for a greater, actually ascertained to be due, is no more certain by established law, than that the case of composition in which the creditors of a debtor enter into the arrangement, and become parties to the contract to accept the smaller amount in satisfaction, forms an exception to the general rule. A defence of this precise character is not, however, set up in the present case. The agreement pleaded, and attempted to be sustained on evidence at the trial, is not for the creditors to receive any ascertained composition, or that they have received it, but that the estate and effects of the debtor should be divided in a certain and specified manner amongst the creditors, who should receive the assignment thereof in satisfaction of the debts due to them, leaving no residuum to the debtor if the proceeds should happen to overpay the debts. For the purposes of the present questions before the court, the rules adopted in cases of composition may, however, be found applicable.

If the composition agreement, for example, purport to pass or to undertake to pass an interest in lands, but wants the formalities required by the Statute of Frauds, it will not bind the creditors—*Alchin v. Hopkins*, 1 B. N. C. 99; or, if the agreement were to make an assignment of goods and chattels *in futuro*, a like objection would prevail. In the present case, however, we are not in any way informed whether lands or goods and chattels formed any portion of the defendant's estate or effects, which may all be composed of money, or choses in action involving no interest in lands, and which would not fall within the Statute of Frauds; and in cases where lands or goods are not concerned, I see no reason why the agreement should not be by parol. Such

an agreement, if entered into by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertaking of the rest as a consideration for his own undertaking. The case of *Good v. Cheeseman*, 2 B. & Ad. 328, was one in which the plaintiff did not sign the composition agreement, but he was held by the jury to have consented to it, and the verdict found for the defendant was sanctioned. *Cooper v. Philips*, 5 Tyr. 166, appears to have been a case of a merely parol agreement, which would not have been a good defence if the defendant had tendered the composition money, or had he been able to shew a consideration for the alleged discharge by the plaintiff of the obligation to tender or to pay it. In this case the court allowed the plaintiff to amend on producing an affidavit of merits.

So far it seems to me that there is no objection in law to this defence on the ground that the plaintiff did not seal a composite deed, or sign an agreement for a composition, or a letter of license, if the evidence be sufficient to go to the jury of the plaintiff's consent to an arrangement by which other creditors might have been induced to forbear pressing their demands; and if no other fatal objection be found, the defence would be good in law, for all that appears upon the notes of the evidence taken at the trial.

Is it, then, an objection to the defence, that the satisfaction is not actually given at the time of the plea pleaded?

Heathcote v. Crookshanks, 2 T. R. 24, was an instance of plea of composition of 5s. 6d. in the pound to be paid in a reasonable time, with a tender within a reasonable time. The plea was held bad, there being no acceptance averred; but *Butler, J.*, says, that if a fund were provided for the payment, and all the creditors were bound to forbear, it might have been a good plea. Or, if the debtor *had* assigned over all his effects to a trustee for distribution among all his creditors, that would have been a good consideration in law for the promise.

In *Good v. Cheeseman*, 2 B. & Ad. 328, the plaintiff and three others signed an agreement to pay one-third of his income to a trustee of the creditors' nomination, and

upon his executing a power of attorney. The defendant did not *sign* the agreement, but produced it at the trial of the cause as a document in which he claimed an interest, and which had been left and was in his possession; no trustee had been nominated, neither was the power of attorney executed; the defence was, however, held good, because there was a new and substituted contract, capable of being enforced, and because the defendant had been willing to perform it.

In the case of *Good v. Cheeseman* the case of *Heathcote v. Crookshanks* was cited, and much commented upon; and though the earlier case was not absolutely overruled, distinctions were taken, not inapplicable to the case before us; for here there is an agreement to forbear, pleaded, and evidence given in support of the plea; there is an agreement to receive something in satisfaction; there is a fund provided—that is, the whole estate; there is actual forbearance on the part of the other creditors, and no default on the part of the defendants: besides all this, the present agreement is not a composition, strictly speaking—it is an agreement for something to be given and taken in satisfaction of a debt, which may turn out of greater value than the amount of the debt, just as easily, for anything that we know, than of less value.

In *Fitch v. Sutton*, 5 E. 230, there was an acceptance of the composition, yet the defence was held not good, upon the principle that a smaller sum cannot be a satisfaction for a greater. In *Stevenson v. Magnus*, 11 E. 191, a contrary doctrine was held to prevail in the case of creditors mutually induced to compound; Lord Ellenborough observes that, had the evidence in *Fitch v. Sutton* gone but a little way farther the judgment must have been the other way. In *Reay v. Whyte*, 3 Tyr. 596, there was an agreement to take 5s. in the pound as a composition to be paid by four and eight months' bills; the plaintiffs afterwards refused to accept less than the whole demand, and the defence was held good. *Cowper v. Phillips*, 5 Tyr. 170; *Shipton v. Casson*, 5 B. & C. 378; *Wenham v. Fowle*, 3 Dow. 43, are cases where, when creditors were concerned, the

agreement to take composition and to forbear was held a sufficient bar.

Com. Dig., Accord B. 4—an accord with mutual promises is good. Cartwright v. Cook, 3 B. & Ad. 701; 10 E. 101.

In the case of Cowper v. Phillips, above cited, the agreement for composition was to take 5s. in the pound; and the defendant pleaded that the plaintiff discharged him from paying him the composition, for it should have been tendered and paid into court, the time having come for paying it.

It appears to me that upon principle, and from a review of all the authorities that I have been able to find, that it is no objection to the accord set up in this case that the satisfaction had not been given at the time of the plea pleaded. The plea sets out distinctly that the time was not come for giving it; or, in other words, for making the assignment—that is to say, a reasonable time; it sets out the readiness and willingness of the defendant to perform his part of the agreement, and the forbearance of the other creditors, and their readiness and willingness. The plaintiff does not take issue upon these points, but merely upon his joining in the agreement for composition.

The valuable note to *Cumber v. Wane*, from *Strange's Rep.*, found in *Smith's L. C.* 146, contains most of the learning on this subject. The same will be found collected in 2 *Wm. Saunders*, 137, *h, i, k*, in a very clear and tangible manner. In that note at *i*, the law is summed up from the case I have already remarked upon, *Good v. Cheeseman*—“and an agreement of this nature between the creditors and the debtor, even though not carried into effect before action brought, will of itself constitute a bar to an action by a particular creditor for his original debt, provided there has been no failure of performance on the part of the debtor; for the agreement, although not properly an accord and satisfaction, amounts to a new and valid contract between the creditors and the debtor, substituted for the original one with the debtor, and capable of being immediately enforced: the consideration to each creditor being the engagement of the others not to press their original claims.”

I am of opinion that the agreement, as an accord to which all the creditors are parties, is good, if there be no other fatal objection, notwithstanding that it is by parol, and notwithstanding that acceptance is not shewn, there being no default on the part of the defendant. The argument is, of course, provisional ; but it is he who seeks to avoid the agreement who has to shew the provisoes or conditions, and the breach thereof upon which it is avoided. No such thing is attempted here.

In the case of *Cowper v. Phillips*, which I have before mentioned, there is an important quære, introduced by the reporter—"whether this plea should not have stated the plaintiff's acceptance of the mutual promises in satisfaction of the debt." "Add to this *Com. Dig.*, Accord B. 4—an accord with mutual promises is good." Then take the very late case, *Hall v. Flockton*, 20 L. J. Q. B. 208; 4 Eng. Rep. L. & Eq. 185, which was a composition case. It is in the Exchequer Court in error from the Queen's Bench.—*Flockton v. Hall*, 19 L. J. Rep. N. S. Q. B. 1. The case was one like the present, where there was not an acceptance—that is to say, there was accord without satisfaction, the time for the perfection of the latter ingredient not having arrived. The plea was held bad in both courts (upon demurrer), because it did not distinctly aver that the agreement was accepted in satisfaction of the debt. It was said in the plea that the plaintiffs accepted the agreement and *arrangement in satisfaction* ; and it was considered that the term arrangement might mean the performance as well as the promise to perform. This, however, was a case in which a plea was held bad upon special demurrer ; but still the question arises whether, in the case before us, the defence is set up, or can be considered so after verdict, that the substituted contract was accepted (provisionally) in satisfaction of the debt. And I think that after verdict (though the plea must have been considered bad upon special, or even upon general demurrer) it must be held good, because it is in the nature of the circumstances set forth that the mutual promises were (provisionally) a satisfaction for the debt. In the

ordinary case between one man and another, the agreement or accord without satisfaction and acceptance may not be good, because the parties to the contract remain *in statu quo* ; but here, where the rights of creditors are concerned, all of whom, with the exception of the plaintiff, have forborne to press their rights, they never can be placed in that position : therefore, in the nature of the things set out in pleading, the mutual promises must (provisionally) have been the intended satisfaction of the debt ; for, as it is pleaded and proved, they, the creditors other than the plaintiff, forbore and cannot be placed by any court in the position in which they were at the time of the accord pleaded.

The replication upon which issue is joined in this case is this:—"That he the said plaintiff and the said other creditors did not mutually agree with each other, and with the defendant to accept or take the conveyance therein mentioned as a composition for, and in consideration of, their said respective debts ; nor was it agreed between them that the said plaintiff was not to proceed for the recovery of his said debt *modo et forma*." I think it would be too much to say that the objection to the plea is fatal after this issue : the replication goes directly to the point of the mutual promises, and to the promise by the plaintiff to forbear.

The next objection as to the pleading is, that, as set out, the promises could not be mutual, because the Bank of Upper Canada, as an aggregate corporation, could not make such an agreement by parol ; and if the Bank had sealed an agreement of accord, it should have been so averred.

I think this is an objection which should have been taken on demurrer. The allegation is, that the Bank covenanted and agreed to receive in satisfaction of their debt, and for the release of the defendant's sureties, an assignment of a certain contract for building the cathedral. This is not denied by the replication. I take it that the conveyance denied in the replication is the one which was to be made to the trustees. There was therefore no necessity to

produce or prove an agreement under seal ; and I think that after verdict the agreement must be presumed to have been a legal one.—2 Wm. Saund. 137 ; 2 Wm. Saund. 228, *c.* It is clear that if the assignment were made to the Bank, and the debt forborne—that is, if the consideration for the composition were executed—it would not make any difference as to the validity of the contract that the Bank was not bound by the contract.—Morton v. Burn, 7 Ad. & El. 19, 23 ; Kenneway v. Trelevan, 5 M. & W. 501 ; the Fishmongers' Company v. Robertson, 5 M. & G. 131 ; 2 Wm. Saund. 137.

The objection is taken that the Bank of Upper Canada cannot be a party to the building contract. But I do not know what the contract is which they agreed to take an assignment of : I suppose it to be a security or undertaking of some persons on behalf of the congregation to pay the defendants money.

The great difficulty I have had in this case arises upon the evidence, as reported from the County Court. So little attention appears to have been paid to exactness in either the examination, cross examination, specifying dates, or classifying papers, that a confused impression of what took place at the trial is all that the notes convey. This, perhaps, was the inevitable consequence of taking a very difficult issue from the court in which the case was instituted to be tried, to a court engaged with a multiplicity of small causes. The learned judge of that court must have felt the writ of trial of this issue a serious infliction, and the cause of loss of precious time, which was due to numerous, though less weighty matters. Under such circumstances it was scarcely to be expected that the issue could have been tried with the deliberation and exact care bestowed upon cases in the higher courts, and which no one in the profession or on the bench knew better how to bestow than the learned judge of the County Court. The report of the case is not satisfactory ; a hundred different points arise as one reads the report, upon which a satisfactory and precise answer would be desirable, but on which only vague and uncertain answers can be found.

It is difficult to say, from the report and the documents returned into this court, which of the papers the parol testimony refers to ; which of the resolutions moved at the meetings of the creditors we have before us ; which have been lost ; or which may have been kept back by the parties whose interest it was that they should not be forthcoming.

The order for the writ of trial was granted by me, upon the application of the plaintiff's attorney, and upon the affidavit of the plaintiff that the issue to be tried involved no legal difficulty. The argument urged was, that the defence set up was altogether unfounded and fictitious, and such as would not be attempted to be sustained at the trial ; and that it was obvious that the defendants were treating for the disposal of all their available estate, time was of the utmost consequence to the plaintiff. I yielded to the plaintiff's urgency and granted the order, and now we are asked on behalf of the plaintiff to set aside the verdict which was the product of that order. I thought for some time that this should not be done, unless the plaintiff had suffered what we can pronounce to be a manifest injustice, and that no new trial should be granted merely to clear up doubtful questions—the consequence of the plaintiff's chosen mode of trial.

The notes forming the plaintiff's demand were proved. No doubt there was a meeting of creditors, (probably all, for it is not in evidence who attended) at which the plaintiff was present ; that a resolution was carried (it is to be supposed unanimously, no one being obliged to submit to the majority, and we are informed of no objection.) The resolution must, I think, have been the one for appointing the plaintiff and others a committee to investigate the defendant's affairs, and to report. The committee sent Mr. Burgess, the witness, to the Bank of Upper Canada to negotiate. The Bank (*quære*, was it the president and directors, or the president, or the cashier?) agreed to take the church for their claim. Then a report was drawn up by the committee which is not produced, because the plaintiff himself took it away after it

was presented. The evidence we have of its contents, shews that it recommended the arrangement or agreement set forth in the plea. Then on the 19th and 20th days of March we find meetings, which seem to have been occupied in settling who were to be the persons to carry out the agreement and to be the assignees. Up to this last point the plaintiff's own testimony shews that he was acting with the other creditors; and there can be little doubt from his own evidence and that of others that he desired to be the sole assignee, not from any distrust in the others proposed, but because he wished the sole advantage arising from the commission. Some of the witnesses depose to his leaving the last meeting spoken of—I think that of the 20th—displeased at not having his way in being the assignee, and taking with him the report and other papers, but nevertheless consenting to any appointment the meeting might resolve upon. He himself says that he made his appointment a *sine qua non*. It would appear that he left the meeting in so disturbed a state of mind as not to remember exactly what he took with him; and the evidence as to what was said or done is on the whole most unsatisfactory, and does not appear to have been attempted to be made more lucid by any inquiry, or examination, or cross-examination at the trial. On the whole, the impression is left upon my mind that up to the time the question was raised as to who should have the advantage of being assignee, the plaintiff was a leading man amongst the creditors: that he made many attempts, and said many things—perhaps not heard by all, but by different persons present—so as to leave it very doubtful whether he left the assemblage in the first place, having agreed to the terms of the composition, and secondly agreeing to abide by the decision of the meeting as to who should be the general assignees: or whether, the first point being undisputed, he really dissented from being a party to the agreement for composition altogether. This latter question, the only one raised, has been submitted to a tribunal of the plaintiff's own choosing, and, with evidence on both sides, has been decided against him; and yet, so much am I dissatisfied with the trial, and even with

myself for having yielded to the injuring of the plaintiff through his legal advisers, in granting the order for a writ of trial, even with the information that I had, that I think, on the whole, that a new trial should be granted: but the consideration of the case has brought to my mind the following arguments in favour of allowing the verdict to stand:—

1st. That the arrangement, such as it is, for a composition between the defendants and their creditors, is one of the plaintiff's choice and approval.

2ndly. That his reason of dissent, is truly given now, and expressed truly and openly at the time, is not meritorious.

3rdly. That to interfere now, when probably the whole matter has been carried into execution, would be to destroy, to a certain extent, an agreement which the plaintiff himself, an excellent man of business, adjudged for the benefit of the creditors.

4thly. That the plaintiff's testimony shews sufficient perturbation of mind on the occasion of his withdrawing from the congregation of creditors, that even according to his own statements, he may have acted equivocally without meaning to do so.

5thly. That others, equally entitled to credit with himself, were under a different impression from that which he has sworn to.

6thly. That the jury have accredited the impressions of the other witnesses in preference to the statements of the plaintiff.

7thly. That to grant a new trial now, when all the effects of the defendants have probably been assigned and disposed of *bonâ fide*, would be to grant a small boon to the plaintiff.

And 8thly. That as a party in the case of an arbitration is held with great strictness to abide by the decision of the person of his own choice, so the plaintiff here, having sworn that the case is not one of difficulty, and having preferred a trial in the County Court, cannot be held lightly to make objection to the result of that trial.

Strongly as these objections have weighed with me, I feel myself forced to agree with my brother McLean in thinking that the ends of justice require that there should

be a new trial in this case, in order that the facts may be clearly elicited, and that the court may adjudge upon them with the satisfaction of knowing that they are correctly before them.

Rule absolute for new trial on payment of costs.

RICHARDSON V. RANNEY.

Fixtures.

The saws and other machinery of a saw-mill are not trade fixtures severable from the mill, and entitled to be regarded as personal property.

Replevin for one circular saw, one large iron shaft and pulley, ten bolts, one shaft box, one cap for shaft box, and other machinery of a saw-mill alleged to be situated on the allowance for road between lots Nos. 10 and 11 in the 1st concession of the township of Tyendenaga in the county of Hastings.

Pleas—1. *Non cepit.*

2. That the goods and chattels were the property of one Phebe Ranney, and not the property of the plaintiff.

3. That the goods were not the plaintiff's.

On the trial, at the last assizes for the county of Hastings, it appeared that the property taken was claimed by the plaintiff under an alleged assignment made to him by one William Kerr, who had put the machinery in the mill; and to support the plaintiff's right Kerr was called as a witness. He stated that he had leased the saw-mill from one Daniel Smith, together with a grist mill, and that he entered into possession, and then put in the machinery, which had been taken away by the defendants, in the place of other machinery which had been there previously: that after being in possession for about a year he assigned his interest to the plaintiff, who had entered upon the premises on the 26th of October, 1850, and continued to hold them till September, 1851, when the things mentioned in the declaration were removed from the mill by the defendant, and the mill nailed up. He stated, on cross-examination, that he had but one lease from Smith, and that he was not aware that he had paid rent for the saw-mill though he

went into possession of it as leased to him by Smith. On a copy of the lease being read to the witness, he said that the premises mentioned in it were those leased to him by Smith.

A witness of the name of Bowes proved that he was in Kerr's employment at the mill from the latter end of August, 1849, to the latter part of October, 1850; and from that time till the end of May, 1851, in the plaintiff's employment, and that he had the possession for the plaintiff of the saw-mill as well as the other premises. The machinery taken was said to be of the value of from 75*l.* to 100*l.*

On the defence, a copy of the lease from Smith to Kerr was proved; and on reference to it, it appears that the premises leased consisted of all that certain buildings then erected by Daniel Smith, and intended for a grist and flouring mill, together with all the privileges and appurtenances thereto belonging, to hold from the 1st day of April, 1849, for the term of six years and a half, subject to certain conditions. No mention whatever is made of the saw-mill in the lease, and no description is given of any premises which could contain it.

A deed was put in, dated the 29th of March, 1851, from Daniel Smith to Phebe Ranney, for premises forming part of Lots Nos. 10, 11, and 12, in the township of Tyendenaga, including the saw-mill which, by the evidence of Thomas Wills, the subscribing witness to the deed, is shewn to be on Lot No. 11, and not on the allowance for road mentioned in the declaration.

The learned judge directed the jury that by the taking of the machinery from the mill the defendants had treated it as severable from the mill, and as trade fixtures which would not become the property of Mrs. Ranney under the deed: that if Kerr purchased the property for himself and transferred it over to Richardson, the jury should find in favour of the plaintiff. It was left to the jury to say to whom the property belonged, considering it as severable from the mill. Upon this direction the jury found a verdict for the plaintiff, and the value of the property at 40*l.*

In Easter term a rule was obtained to shew cause why

the verdict should not be set aside and a new trial granted, the verdict being contrary to law and evidence, and for misdirection.

Cause was shewn against the rule by *Wallbridge* during the term, who contended that the verdict was supported by evidence, and that there was no misdirection: that Kerr was in possession, and put the machinery into the mill, and then assigned his possession to the plaintiff: that the defendant, having detached the property from the building, treated it as a trade fixture; and that if it was a trade fixture, it clearly belonged to the plaintiff.

Helliwell, contra—That the machinery belonged to the freehold, and therefore belonged to the defendant, who held the legal estate (*Oates v. Cameron*, 7 U. C. Q. B. R. 228); that she had a right to enter into possession, and do as she thought proper with the property.

McLEAN, J.—It is quite clear to me that the learned judge was wrong in regarding the machinery used in working the saw-mill as trade fixtures severable from the mill, and entitled to be regarded as personal property. The saw and all the machinery were absolutely necessary for the working of the mill; and without them in fact the mere building and the wheels and remaining works could not be regarded as a saw-mill. The machinery, as appears by Kerr's testimony, was put in by him to replace other machinery and an upright saw which had previously been in use; and when he assigned to the plaintiff, it was not merely the new machinery which he assigned, but his interest in the whole premises. There is, however, no assignment produced from Kerr to the plaintiff, and nothing but Kerr's declaration to shew what *was* assigned. It appears from the testimony that in fact Kerr had no interest in the saw-mill which he could assign beyond a bare possession. The owner of the property could not by any such assignment be prevented from entering and taking possession at any time when it could be done without a breach of the peace, and thus putting an end to a tenancy at will. At the time of Mrs. Ranney's entry into the mill and removal of the machinery, she appears to have been

the owner under the deed from Smith, whose title to the premises, before Kerr had anything to do with them, is admitted. She then could not be regarded as a trespasser for entering upon her own property, which the evidence does not shew any one else to have been entitled to the possession of. She, having a right to enter, took possession of the mill as she found it: the machinery was part of the mill, and could not possibly be considered as mere personal property unconnected with it. The whole was fixed in the mill, and formed an essential part, without which the premises would be useless. They could not have been severed and made liable to seizure on execution, or on a distress for rent. The case of *Oates v. Cameron*, 7 U. C. R. 228, decides that a steam engine bolted to a wooden frame upon which it rested was not less a fixture because it could be taken down and removed without defacing or removing any part of the walls of the building within which it was situated. So in this case the machinery could probably be removed without injury to the other works or the frame of the saw-mill, but the whole, when connected and ready and necessary for working the mill, must be regarded as fixed property. As well might it be said that the doors or windows of a building may be regarded as personal property because they may be unscrewed or taken out without injury to the building.

The machinery which is in controversy in this suit was substituted in the mill for other machinery which had been previously in use there; and if it had been removed by any person after Mrs. Ranney became the owner of the mill, she could have brought an action and recovered damages against the party removing it. She became by the deed to her the owner of the mill as it stood at that time, and any injury subsequently done to it she would be entitled to recover for. The plaintiff has shewn no right to the mill or anything connected with it beyond a bare possession obtained from Kerr, who, so far as appears, had no right to transfer it. The defendant, Mrs. Ranney, has shewn an apparently good right to the premises, and cannot be held responsible for removing property which was her own. My

opinion is, that the verdict for the plaintiff must be set aside, and a new trial granted without costs, on the ground of misdirection.

SULLIVAN, J., concurred.

Rule absolute.

McNELLIS v. GARTSHORE.

Proof of malice and want of probable cause.

Where A. goes before a justice of the peace and charges B. with having clandestinely removed and secreted a quantity of wool and books belonging to him, and the justice of the peace on such complaint of A. issues his warrant directing his constable to search for the said books; and if the same should be found, to bring the books so found, and also the said B. before him, &c., to be dealt with according to law:

Held, that the charge and nature of the complaint not being such as authorized or justified the justice of the peace in issuing his warrant, B. can only recover against A. by proving that in making the complaint A. acted maliciously and without any reasonable or probable cause.

This is an action on the case brought against the defendant, for maliciously, and without any reasonable or probable cause, laying information or making a complaint before a magistrate, and causing a warrant to be issued, and the plaintiff to be arrested and kept in custody; and for entering the plaintiff's house and searching, &c., therein, in order to execute the warrant.

There are three counts in the declaration. On the first, the verdict is for the defendant. This count charges the defendant with having appeared before Stephen Young, a justice of the peace for the County of Northumberland, and having before the said justice of the peace falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having, within one month then last past, *feloniously and clandestinely* removed and secreted from and out of the premises of the defendant, in the township of Murray, certain goods and chattels of the defendant—viz., a quantity of wool and books of the defendant—and upon such charge falsely and maliciously caused the justice of the peace to make his warrant for the bringing of the body of the plaintiff, together with the said books, before him or some other justice of the peace, to be dealt with according to law; that the defendant, under and by virtue of that warrant, afterwards wrongfully and unjustly, and without any reasonable cause whatsoever,

caused and procured the plaintiff to be arrested by his body, and to be imprisoned, and kept and detained in prison, &c. ; and to be brought before the said justice of the peace to be examined touching and concerning the said supposed crime ; that the said justice having heard and considered all that the defendant could say against the plaintiff touching the said offence, adjudged and determined that the plaintiff was not guilty, and caused the plaintiff to be discharged.

The second count charges the defendant with having heretofore—to wit, on the 25th day of July, 1851—falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having *committed a certain offence* punishable by law—to wit, with having *clandestinely removed* from the premises of the defendant, and secreted certain goods and chattels of the defendant—to wit, a quantity of wool and books to the value of 50*l.*—within one month previous to the making of the said charge, and with having concealed the said books in the said premises ; and *upon such last mentioned charge*, that the defendant falsely and maliciously caused and procured the plaintiff to be arrested by his body, and to be imprisoned and detained in prison for a long space of time, at the expiration of which time the plaintiff was duly discharged and *fully acquitted* of the said last mentioned offence—by means of which several premises the plaintiff has been greatly injured in his credit and reputation, &c. ; and divers of his neighbours, &c., to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe that the plaintiff was *guilty of felony* and of the other offences aforesaid so charged against the plaintiff by the defendant : and the defendant hath been forced and obliged to lay out and expend divers large sums of money in procuring his discharge from the said imprisonment.

Third count—That the defendant, on the 25th of July, 1851, went before Stephen Young, a justice of the peace, and then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, made a

complaint before the said justice of the peace that certain goods and chattels of the defendant—to wit, a quantity of wool and books to the value of 50*l.* currency—had, within one month then last past, been clandestinely removed and secreted by the plaintiff from and out of the premises of the defendant, in the township of Murray; and that the defendant had probable cause to suspect that a part of the said goods—viz., the books—were *then concealed under lock and key, in the said premises*, occupied by the plaintiff, in the said township; and upon such complaint the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused the said justice of the peace to make a certain warrant under his hand and seal, directed to one C. G. Baker, constable in the said township of Murray, whereby, after reciting that it had been made to appear to him, the said justice, on the information of the said defendant, that there had been, within one month of the said information, clandestinely removed out of the premises of the defendant and secreted, certain goods and chattels of the defendant—viz., a quantity of wool and books to the value of 50*l.*; and that the defendant had probable cause to suspect, and did suspect that a part of the said goods—viz., the said books—were concealed under lock and key in the premises occupied by the said plaintiff, in the said township of Murray—the said Stephen Young requiring the said constable to whom the said warrant was directed, in the name of our Lady the Queen, and with necessary and proper assistance, to enter in the day time into the premises of the plaintiff, in the said township and there diligently to search for the said books; and if the same should be found in such search, then that the said constable and his assistants should bring the said books so found, and also the body of the said plaintiff before him, the said Stephen Young, or other justice of the peace, to be disposed of and dealt with according to law, by virtue of which said warrant and under colour thereof, and by pretext of the execution thereof, the defendant, together with the said C. G. Baker, constable without any reasonable or probable cause, and without the leave or license of,

and against the will of the plaintiff, entered the house and premises of the plaintiff, in the said township, and broke the locks, &c., attached to the doors thereof, and continued therein for a long space of time, and during that time searched and ransacked the house, &c., of the plaintiff; and tumbled about the books, furniture, papers, &c., and thereby disquieted the plaintiff in the possession of his house, and deprived him of the use thereof; and the plaintiff saith that neither the said wool nor the said books, nor any goods or chattels of the defendant, clandestinely removed or secreted, were found in the said house or on the said premises of the plaintiff on such search as aforesaid; nor were there any such goods and chattels therein, before or at the time of the said complaint, or at any other time; nor had the defendant any reasonable or probable cause whatever for making the said complaint or giving the said information, or causing the said warrant to be issued or executed; and the plaintiff says that the defendant did not further prosecute his said charge, and the same wholly ended and determined, by means whereof the plaintiff has been greatly injured in his character, and divers persons suspect and believe that the plaintiff hath been and is *guilty of the offence* by the defendant imputed to him, &c., to the plaintiff's damage of 100*l*.

Plea—Not guilty.

On the first trial, before the Chief Justice of this court, a verdict was rendered for the plaintiff on the second and third counts—which verdict, on the application of the defendant, was set aside and a new trial granted, with costs to abide the event. The cause was again brought to trial, before Mr. Justice Burns, at the last spring assizes in the county of Hastings, and a verdict found for the plaintiff and 35*l*. damages. At the trial a nonsuit was moved for on the ground that the falsity of the charge made by the defendant should be shewn: that the information only prays that the books may be seized, and upon such information a warrant was issued to bring the body before the justice of the peace: that no felony is charged, and that the charge only amounts to a civil trespass: that the charge for

secreting the books was in fact true, and the constable proved that the plaintiff was shewn where the books were; that the want of probable cause should have been shewn by the plaintiff, and that was not done by the evidence: that as to the wool, there was no evidence of arrest for it, and that should be struck out. Leave was reserved by consent for the defendant to move for a nonsuit for the insufficiency of the plaintiff's case.

In Easter term last the defendant's counsel obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial; or why a new trial should not be had between the parties without costs—the verdict being contrary to law and evidence, and the charge of the learned judge who tried the cause.

Richards shewed cause during the term; and on the argument contended that the books said by the defendant in his affidavit to have been clandestinely removed by the plaintiff and secreted, belonged in fact to the plaintiff, and were kept by him to know the extent of business done, as the plaintiff's remuneration for services depended on the amount of profits: that when the defendant claimed the books the plaintiff admitted that he had them, and there was no pretence for saying that the plaintiff had clandestinely removed them: that the charge against the plaintiff imports something of a criminal nature: that, as to the wool some was sold, and the sale entered in the books, under the authority which the plaintiff had as the defendant's agent in managing the carding machine, and that the books were not produced on the trial, pursuant to notice, from which it must be inferred that entries as to the wool were made therein: that the charge of the learned judge to the jury was that if they thought the defendant acted maliciously, to find against him—if not, to find for him; and as this is the second verdict found for the plaintiff the court should not disturb it. As to the action being case or trespass, he cited *Branscomb v. Bridges*, 1 B. & C. 145, to shew that the plaintiff might waive the trespass and bring an action on the case; and to shew that the plaintiff may

recover on proving part of his allegation, he cited *Reed v. Taylor*, 4 Taunt. 617.

In reply, *Wallbridge* contended, that no offence is charged in the information: that the plaintiff was bound to make out the falsehood of the charge, had an offence been charged, but that the contrary was clearly proved by the evidence: the books, which had been kept in a particular place, had been removed by the plaintiff and locked up; and it was not denied that the plaintiff sold wool: that the sale should be entered in the books by the plaintiff; and when the books were concealed by him a presumption would arise that the wool had also been clandestinely removed: that the warrant was to search for the books only in Murray, and to arrest if the books were found; but there was no warrant to search for wool, or to arrest on account of it; and that there must have been an arrest for the wool as well as the books to enable the plaintiff to sustain this action: that the plaintiff did not prove any want of probable cause or malice on the part of the defendant, even supposing an offence charged: that no trespass is charged against the plaintiff—the clandestine removal of books which were in the plaintiff's possession as agent or servant of the defendant not amounting in law even to a trespass. He cited *Freeman v. Arkell*, 2 B. & C. 495; *Taylor on Evidence*, sec. 967, page 882; *Hinton v. Heather*, 14 M. & W. 16 L. J. N. S. 23, 158; 14 L. J. 41; *Cox v. Reid*, 18 L. J. Q. B. 1849.

McLEAN, J.—On reference to the evidence taken at the last trial, I find that it was proved that the plaintiff was engaged in working a carding machine for the defendant for a season; that his duty was to receive wool for the purpose of being carded, to keep the books of the concern, and to attend to the working of the machine. The agreement was not produced, either at the trial or term, and it was not shewn that the plaintiff had any authority to sell wool from the carding mill. The plaintiff was to receive, as remuneration for his services, one half the profits to be derived from the work done in the mill. It appeared in evidence that the defendant found fault with the mill being left open on some

occasion, and that, finding that the wool had been sold to one Brady, or in some way obtained from the mill by him, the defendant became dissatisfied, and on going to the mill he found that the books had been removed from their usual place, and could not be found by him : that on going to the plaintiff to ask for them, plaintiff at first made no reply, but at last told defendant that he should not get them. The defendant then went to a justice of the peace, who drew out in his own way a statement of the defendant's complaint : " That William G. McNellis, labourer, had, within a month last past clandestinely removed and secreted a quantity of wool and books belonging to the complainant, to the value of fifty pounds currency ;" and the justice of the peace adds, " therefore this complainant prays of me, the said justice, that a search warrant may issue, and that said property, if found, be brought before me, and also the body of the said William G. McNellis, as this informant believes that the said books are secreted in a room in the carding mill, situate in Murray, in the county aforesaid ; *therefore this complainant prays that justice may be done in the premises.*" On this complaint thus reduced to writing by the justice of the peace, a warrant was issued, reciting, not very correctly the complaint directed to C. G. Baker, constable in Murray, commanding him in the name of our lady the Queen, with necessary and proper assistance, to enter in the day time into the premises of William G. McNellis, in Murray, and there diligently to search for the said books, and if the same should be found to bring the books so found, and also the body of the said William G. McNellis, before him or some other of her Majesty's justices of the peace, to be disposed of and dealt with according to law.

Upon this warrant the books were found where they had been placed by the plaintiff, in a chest or drawer, which was locked, in the carding mill. The plaintiff shewed where he had placed the books; and on their being found he was arrested and brought before the justice of the peace, in pursuance of the terms of the warrant.

The whole difficulty between these parties, as to the

cause of action, seems to have arisen from the erroneous idea of the justice of peace, that a complaint charging "a clandestine removal of property," justified or required the issuing of a warrant as for a criminal offence, when the utmost that it could have justified was the issuing of a summons under the act relating to petty trespasses. The defendant in the complaint as made out by the justice of the peace, is made to pray on oath, "that a search warrant may issue and that the property, if found, may be brought before the justice of the peace, and also the body of William G. McNellis, as the informant believes that the said books are secreted in a room in the carding machine in Murray;" and then in conclusion he is further made to pray, "*that justice may be done in the premises.*" The prayer that "a search warrant may issue, and that if the property is found the plaintiff may be brought before the justice of the peace, to be *disposed of* and *dealt with according to law*; and the further prayer that justice may be done in the premises, can surely not be regarded as any part of the subject matter of the defendant's complaint before a magistrate: the sole matter of complaint was, that certain wool and books of the defendant had been clandestinely removed and secreted by plaintiff within a month then last past; and all that relates to the issuing of a search warrant and the arrest of the plaintiff in case of the property being found, is matter *dehors* the complaint, and seems to have been inserted by the magistrate as the proper mode of dealing with such a complaint. All that the defendant required of the magistrate, as appears evident from the concluding paragraph or prayer of the complaint, was, that justice should be done in relation to the clandestine removal of his wool and books; and by way of justice, the magistrate issued a search warrant, and a warrant to arrest the body of the plaintiff in case of the books being found; and for this doubtful measure of justice thus dealt out by the justice of the peace—at the defendant's expense, for it is proved that he paid the costs—the plaintiff seeks to recover damages against the defendant, as if he were the party who caused his arrest, when in fact the nature of the complaint

was not such as to cause the issuing of any warrant, or to justify such a proceeding.

The 2nd count is, for the injury occasioned to the plaintiff in various ways by the arrest, and the last count is for entering into the plaintiff's house and disturbing him in searching and in executing the warrant. If the defendant can at all be held responsible for the issuing of a warrant and the consequences which resulted from it, when the subject matter of his complaint did not call for or justify any such proceeding, the plaintiff can nevertheless only recover in this action by shewing, that in making the complaint the plaintiff acted maliciously and without any reasonable or probable cause.—*Johnson v. Sutton*, 1 T. R. 544 ; *Musgrave v. Newell*, 1 M. & W. 582 ; *Crozer v. Pilling* 4 B. & C. 26 ; *Blachford v. Dod*, 2 B. & Ad. 179 ; *Michell v. Williams*, 11 M. & W. 204. As to the wool it appears to me that the evidence respecting it was not properly receivable to sustain the plaintiff's recovery on the last two counts, unless indeed for the purpose of shewing malice on the part of the defendant for this reason, that no search or arrest was made on account of the wool, and the plaintiff has no right to complain of an arrest which was ordered only if the books should be found, or of a disturbance in his house in executing a warrant, as if it related to the wool, when it related wholly to something else. Then as to the wool, there is evidence to shew a sale to one Brady by the plaintiff, but I do not find any testimony to shew that the plaintiff had any authority whatever in his position, to sell wool. So far then, as the complaint relates to the wool (and it is not for making the complaint that the action is brought), there appears to have been no want of probable cause, but quite the reverse and all claim for damages on that score must fall to the ground. The only ground upon which the plaintiff could seek for damage from the defendant (assuming him to be answerable for the error of the magistrate in issuing a warrant not sanctioned by the nature of the charge), must be for the proceeding in reference to the books. Then as to that, has the plaintiff shewn by evidence any want of probable cause or malice on the part of the defendant ? The

statement that the books were clandestinely removed and secreted by the plaintiff is proved to be true. The testimony shews that they were removed and locked up by the plaintiff who refused to let the defendant have them or know where they were. It is also shewn that the plaintiff spoke about that time of leaving the country, and when the books were removed from their usual place and locked up, to keep them from the defendant, he had good reason to charge the plaintiff with a clandestine proceeding.—*Lucy v. Smith*, 8 U. C. R. 518.

My strong impression now is, that the action against the defendant cannot be sustained on this declaration; and even if it were sustainable, I am clearly of opinion that, instead of proving malice, or making out a total want of probable cause on the part of the defendant, so that malice might be inferred, the evidence establishes that there was good and probable cause for the defendant's complaint before the magistrate.

My opinion therefore is, that the plaintiff ought to have been nonsuited at the trial, and that the verdict must now be set aside and a nonsuit entered.

SULLIVAN J.—In the present case the defendant had not only reasonable and probable cause for his complaint, but the complaint is absolutely true. His case is this:—He hired a man to work his machinery, who was to manage the business and to get half the profits; he was to be also the book keeper. This was no partnership. No right of appropriation of anything is shewn in the plaintiff until the profits are realized and divided: the books of the business, whoever furnished them, belong to the defendant. Then the defendant discovers that his books are missing, and that some of his wool is missing: he complains, not that the plaintiff has stolen the articles, but that he has clandestinely removed them;—a clandestine removal in this case is a removal without the knowledge of the owner. The books are afterwards found concealed under lock and key in the place indicated; the wool is found to have been sold, and the money for it received. It is suggested on the side of the plaintiff that there was no felonious intent in the plain-

tiff in removing the books from the desk and locking them up from owner, and that possibly the plaintiff accounted for the wool; but no felonious intent was charged, and I admit that there may have been none; but were not, after all, the books secreted clandestinely? and can there be said to be a particle of proof that the wool was not clandestinely sold? The wool was sold and taken away from the defendant's premises—the defendant has sworn clandestinely: the plaintiff has to meet this, not by allegation, but by proof, which he has not attempted to do. Where is his proof of authority to sell and receive money for the plaintiff's wool? Where is his proof of the knowledge of the abstraction of the books and the wool, in the defendant, or of his consent to their removal or secretion?—*Hinton v. Heather*, 15 M. & W. 133; 16 L. J. N. S. 23, 158; 14 L. J. 41; in re King, Gent, one, &c., 8 Q. B. 252; 18 L. J. 216 Q. B.

The facts of this case indubitably proved and reasoned upon as admitted, may be stated in a condensed form, as follows:—The defendant was proprietor of a carding machine; he entered into an agreement with the plaintiff, and the plaintiff with him, that the plaintiff should manage the machinery and business, and keep the books; and that the plaintiff should receive for his reward or wages one half the profits.

The business of a carding machine is to receive the wool brought to it, to card it into rolls—the work being to be paid for in money, or in certain tolls or shares, as may be agreed upon. It is not proved in this case that it was any part of the duty of the plaintiff to sell wool either raw, or carded. So far as I can see, the defendant was the sole proprietor, consequently the wool received as tolls or shares was his. The books were his, because they concerned his business solely. The plaintiff had a claim upon him for half the profits, when profits should be realized. As I understood the bargain of the plaintiff and defendant, it was for the *season*—at all events, there is nothing in the evidence to contradict the supposition. Then the plaintiff's right to any return from the mill did not accrue until profits were realized either for the season or for the time of the

engagement of the plaintiff with the defendant ; and when profits would be realized and divisible the plaintiff's claim would be on the defendant personally, but he would have no lien or property in the money or things received at the mill, nor upon the mill itself, nor upon the books.

In this state of things the defendant in this case made an accusation before a magistrate against the plaintiff ; he accused him of having, within a month previous to the time of the complaint, *clandestinely* removed and secreted certain wool and books of his, the complainant's ; and he prays, or is represented in the magistrate's written record of the complaint as praying for a search warrant for the books ; and in the event of the books being found in the place designated, he is made to ask for the arrest of the plaintiff, so that he might be dealt with according to law.

A warrant issued, the plaintiff was arrested and imprisoned, and he brings this action in consequence.

The plaintiff does not, in either of the counts upon which he has obtained a verdict, charge the defendant that he, well knowing that the plaintiff had not been guilty of any offence to make him liable to imprisonment, or to have a warrant issued to search for chattels in his possession, nevertheless had caused and procured a search warrant to be issued and executed, and the plaintiff to be arrested as upon a criminal charge. If such had been the plaintiff's case upon the declaration, it might have been a question to leave to the jury, whether in truth and reality the defendant had thought the plaintiff liable to such proceedings. The jury might have been told that their verdict should depend upon the *bona fides* or on the *mala fides* of the complainant : that it was a common defence in actions of this nature, that the defendant had taken the advice of counsel learned in the law, that in such a case it would be a question for the jury to decide whether or not the defendant in an action for malicious prosecution was really influenced and directed by the advice he received, or whether he only made that advice a cloak for a malicious prosecution on his part.— (See *Ravenga v. Mackintosh*, 2 B. & C. 693.) It might perhaps have been properly said to the jury, the present is

a case wherein a man goes before a magistrate supposed to be sufficiently learned in the law to decide officially as to the nature of a complaint made before him; and the very fact of his having issued his warrant upon a true statement of insufficient facts is very strong evidence in favour of the defendant, who may well be supposed to have acted upon the advice, or rather upon the adjudication of the magistrate; but nevertheless, strong as the ground of defence would be, it probably would still be a question for the jury whether the defendant, influenced by the decision of the justice of the peace, had innocently pursued his opponent by something in the shape of a criminal proceeding: or whether, on the other hand, the defendant was himself aware that the complaint did not warrant any criminal process.

But the case before us is founded, not upon the insufficiency of the charge, but upon its falsehood, and upon its want of a foundation in reasonable or probable cause; and the evidence at the trial, so far from shewing that the charge before the magistrate (however frivolous as a criminal accusation) was false, or without reasonable or probable cause, all goes to shew that the accusation, such as it was, was true.

To support the plaintiff's declaration he must have been able to prove that the goods alleged to have been removed and secreted were, to the knowledge of the defendant, not his goods; but the books, so far as we can see from the evidence, were his, and so was the wool.

Then, failing in this, he should have proved that he did not remove or secrete the wool or the books: as to the latter there can be no doubt, but upon the plaintiff's own shewing that these books—that is to say, the account books of the plaintiff's business—were removed from the desk, where the interest and equities belonging to both would have required them to have remained; or but that the books were locked up and secreted by the plaintiff. Then, as to the wool—I can see no legal ground upon the evidence for supposing that the plaintiff had a right to sell the defendant's wool, or to receive money for it unknown to the defendant; and when I consider that the burden of

proof lay upon the plaintiff to shew the charge (such as it was) false and unfounded, I am of opinion that the learned judge was right at the assizes in thinking that the action could not be sustained; for there can be no doubt but that wool was sold by the plaintiff, and money received for it. At the same time there is not any proof that this disposal of the plaintiff's property was not clandestine, or that his charge upon oath as to the removal and secretion was unfounded.

The cases to which I have principally referred are—*James v. Phelps*, 11 Ad. & El. 489; *Delegal v. Highley*, 3 B. N. C. 950; *Blachford v. Dod*, 2 B. & Ad. 179; *Ravenga v. McIntosh*, 2 B. & C. 693; *Davis v. Hardy*, 6 B & C. 225; *Musgrove v. Newell*, 1 M. & W. 582; *Turner v. Ambler*, 11 Jur. Q. B. R. 346; *Hudrich v. Heslop*, 12 Jur. 600; *Michell v. Williams*, 11 M. & W. 205; *Hinton v. Heather*, 14 M. & W. 131; *Rowland v. Samuel*, 17 L. J. Q. B. 35.

Rule absolute for nonsuit.

IN RE RIDOUT, REGISTRAR OF THE UNITED COUNTIES OF
YORK, ONTARIO, AND PEEL.

A Registrar is bound to register or file a certificate or discharge of a portion of the lands contained in a mortgage.

During the last term *Wilson, Q. C.*, obtained a rule calling upon the Registrar of the united counties of York, Ontario, and Peel, to shew cause why a mandamus should not issue, commanding him to register or file a certificate or discharge of a certain portion of lands contained in a mortgage made by Terence Joseph O'Neil and Peter James O'Neil to the late Colonel Robert Roberts Loring deceased, bearing date on the ninth day of February, one thousand eight hundred and forty-eight, and registered on the 27th day of March following (which portion of land is particularly described in the certificate), *or* to mark so much of the mortgage or the land in the mortgage in the said certificate or discharge contained as discharged, *or* to proceed in such other way according to the statute in that behalf, that the portion of the land in the said certificate or discharge mentioned may be exonerated from the mortgage in the said

certificate or discharge mentioned, why the said Registrar should not pay the costs of the application and the proceedings to be had thereon. In support of the application an affidavit was filed that the certificate of discharge of a portion of a mortgage debt had been presented at the register office to the Registrar and that he then refused to register the same, on the ground that it was contrary to the statute in that behalf, and expressed his desire to leave the question to be decided by the court whether he ought to register the certificate or not; that when the Registrar declined, on these grounds, to register the certificate, a letter from Mr. Wilson was delivered to him, containing Mr. Wilson's opinion on the point, and stating that if the Registrar should persist in declining to register the discharge he would be obliged to apply to the court for a mandamus.

The certificate presented to be registered is signed by John Hillyard Cameron, acting executor of the estate of the late Colonel Robert Roberts Loring, deceased, and is to the effect that the mortgagors have satisfied all moneys due upon a certain mortgage made by them to the said Colonel Robert Roberts Loring, *as far as such mortgage relates to the portion or piece of land* now in the occupation of the Honourable James Gordon, and a particular description by metes and bounds is given of such portion. The execution of the certificate by Mr. Cameron as executor is duly proved by a subscribing witness.

On the last day of term, *Hagarty*, Q. C., shewed cause against the issuing of a mandamus, and contended that it was not incumbent on a Registrar to enter a release of part of the lands mentioned in a mortgage in the same manner as required by the 23rd section of the 9th Vic. ch. 34, in reference to the entire contents of a mortgage: that the release in question is in the form attached to that act, and relates only to part of the premises, and that if the Registrar is bound to enter it in that form he will have to enter a release of premises by another description than that in the mortgage: that the Registrar cannot write, as required by the statute, the word "discharged" in the margin of the register book, when only a portion is dis-

charged: that parties have no right to carve out a description from the original, and thus create a new description: that a conveyance should be given, and by that any portion of mortgaged premises might be released, but that a certificate of payment of the *whole mortgage money* as to part of *the mortgaged premises* cannot be given, and that the statute did not contemplate a release of part in that way.

Wilson, Q. C., in reply, contended that by the 14th & 15th Vic. ch. 7, sec. 8, a mortgagee is entitled to discharge any part of mortgaged premises from the incumbrance of a mortgage, whether any money is paid or not, on any arrangement being made for exonerating such part, and that such conveyance, release, or discharge, as to part must be registered in the same manner as if it were a release or discharge of the whole mortgage.

McLEAN, J.—By the 9th section of 12th Vic. ch. 71, an executor or administrator of a mortgagee entitled to the money secured by a mortgage was empowered, upon payment of the principal money and interest, to convey, by deed, or surrender the legal estate, though vested in the heir or devisee of the mortgagee, if possession of the land had not been taken under the mortgage and no action or suit were depending in reference to it. That clause is repealed, with other clauses of the same act, by 14th & 15th Vic. ch. 7; and the 8th section of the latter act gives to executors or administrators extended powers to convey, release, and discharge a mortgage debt and the legal estate in the land mortgaged, and it is declared that an executor or administrator shall also have the same power as to any portion of the lands, on payment of some part of the mortgage debt, or on any arrangement for exonerating the whole or any part of the mortgaged lands without payment of money, and such *conveyance, release, or discharge*, shall be as effectual as if made by any person having the legal estate.

Neither of these sections point out how a release of the whole or part of mortgaged premises is to be recorded, but the mode of proceeding in the former case is provided by the 23rd section of the Registry Act 9th Vic., ch. 34, and the form of certificate to be given in such a case is given in

the schedule attached to the act. That form is adhered to in the present case, so far as it is applicable, where only part of the premises are intended to be released from the incumbrance. The executor certifies that the mortgagors have satisfied *all moneys due upon the mortgage, as far as the same relates to a certain part* of the premises which is particularly described in the certificate. The object of such certificate was to relieve the portion described from the incumbrance of the mortgage, and as the executor has power, under the clause referred to, to exonerate any part, there can be no doubt that the certificate will have the effect, when registered, of releasing from the mortgage the portion of the premises to which it relates. A mortgage duly recorded must appear in the shape of an incumbrance on the property contained in it, till a discharge is entered, and any person who has paid up a mortgage is entitled to have a discharge entered on the registry books, in order that the title to his property may appear on record free from such incumbrance. Till the passing of the act 14th & 15th Vic. ch. 7, a portion of mortgaged premises could only be released from incumbrance by deed, to be recorded in the usual manner, but that act evidently contemplates that a portion of the lands in any mortgage may be released in the same manner as the whole—that is, by the same kind of certificate; it says that the executor or administrator shall have power, either as to the whole or part, to *convey, release, and discharge*, and that such *conveyance, release, or discharge*, shall be as effectual as if made by any person having the legal estate. Then, by a reference to the 24th section of 9th Vic. ch. 34, I find that a certificate in the form previously in use, or such as prescribed by that act, of the payment of mortgage money, is declared to be valid and effectual in law as a *release of such mortgage*, and as a *re-conveyance* of the original estate of the mortgagor, so that the certificate in this case amounts to a *conveyance, release, and discharge*, within the meaning of the statute. Then, if there be no objection as to the form of the instrument, and if the mortgagor is entitled to have it recorded for the purpose of releasing a portion of his property from

incumbrance, it does not appear to me that this court is called upon to do anything more than to issue a mandamus to compel registry. I do not think it necessary to give an opinion as to the proper mode of proceeding for the purpose of recording. The statute is silent as to such mode in cases like the present, and we cannot issue a mandamus and direct the Registrar to pursue any particular course. He must be guided in that respect by his own sense of what his duty requires under the statute. The affidavit shews that he refused to register the certificate, on the ground that it was contrary to the statute. In this respect I think he was wrong (a); and if he persists in refusing, I have no doubt that a mandamus may issue to enforce the performance of duty. But I am not prepared to take upon myself the responsibility of directing by any mandamus the mode in which the registry shall be made.

I have no objection however to state my impression as to the course which the Registrar is entitled to adopt in all cases of release of mortgages.

By the 23rd sec. 9th Vic. ch. 34, a Registrar on registering a certificate, in the form in the schedule attached to that act, proved by the oath of a subscribing witness, in the same manner as any instrument affecting lands, from the person entitled to receive the amount of a mortgage, or the attorney of such person, is required *to write the word "discharged," and to affix his name in the margin of the register wherein the mortgage may be registered*, and it is declared that this *shall be deemed a discharge thereof*, and then the clause says further: "and such certificate shall be filed and numbered, and entered on the margin of such register *under the word 'discharged.'*" The latter clause of the section seems to have been inserted in order that there may be a reference to the certificate by which it may be found, but it does not seem to me to be essential to constitute a discharge that the direction which it contains should be followed by the Registrar. The discharge being made by the Registrar writing in the margin of the memorial the word "discharged," and affixing his name, is absolute, and cannot, as it appears to me, be affected by any omission on the part

(a) 9 Q. B. 806; 7 Q. B. 155; 6 Q. B. 974; 9 Jurist, 618; 2 T. R. 381; 2 M. & S. 223.

of the Registrar to file and number the certificate, or to enter it on the margin of the register under the word "discharged." Then, as to the entry of the certificate on the margin, contemplated by the statute: it does not appear reasonable to suppose that the legislature could have intended that a certificate of release must be copied on the margin. In very many cases such a direction could not be complied with, as the number of such entries would probably be more than the margin of any register book could possibly contain. The fact of the *filing* and numbering being prescribed in connection with the entry on the margin, and that too after a declaration that the mere entry of the word "discharged" and the signature of Registrar's name in the margin "shall be deemed a discharge," satisfies me that the sole object of the direction as to the entry of the certificate on the margin is to secure a mode by which the discharge may be found in the registry office, and not to shew the discharge itself.

An entry as required by the statute would, as it appears to me, be satisfied by a memorandum shewing the date of such discharge, the names of the witnesses, by whom proved, and the parties, in any case where a mortgage is wholly discharged. But where only a part of the premises in a mortgage are discharged, the Registrar cannot write the word "discharged," and sign his name in the margin of the register, because if he did, it would appear as a discharge of the whole mortgage, and the certificate being limited to a part could not justify such an entry. As, however, he is bound to register such a certificate, the question arises by what entry in the margin the release of part of the mortgaged premises is to be indicated, and how such entry is to be rendered effectual as a discharge? The release being only as to part, the entry of discharge in the margin must necessarily correspond with it, though the statute does not prescribe the form of entry in such a case, and it must rest with the Registrar to make such an entry as will shew the particular circumstances. There is no provision in the statute that an entry or writing on the margin of the words "discharged as to part," with a statement as to what part shall be deemed a discharge" when subscribed by the Registrar, but there does not appear to be any other mode

by which the discharge of a part can be indicated; and when the Registrar has done all that he can to give effect to the statute, he will at all events be blameless should his efforts fail to be effectual, on account of omissions or defects in the statute in reference to his duty in this respect

In this case I do not think the rule can be made absolute to any greater extent than that the certificate shall be registered, and to that extent my opinion is, that a mandamus should go. It will then rest with the Registrar to proceed in such manner as he shall consider most proper to give effect to the provisions of the statutes which authorize a portion of premises which have been mortgaged to be released.

SULLIVAN, J.—I think the remedy sought for by mandamus is, in the present case, the proper remedy.

In the case of *Rex. v. The Collector of Liverpool*, 2 M. & S. 223, the Court of King's Bench entertained a motion for a rule for a mandamus to compel registry of a ship.

Also, in the case of *Regina v. Arnaud*, 9 Q. B. 806; in *Rex v. The Commissioners of Excise*, 2 T. R. 381; and in *Regina v. The Commissioners of Excise*, 9 Jurist, 618, like motions were entertained to compel the granting of permits for the removal of wine.

In *ex. p. Irving*, 7 Q. B. 156; and in a case in 19 L. I. Q. B. (N. S.) 537, like proceedings were taken, to compel county registrars to register memorials of deeds.

In each of these cases the matters brought before the court were discussed and decided upon the merits of the questions submitted, and there seems to be no doubt but that the court has jurisdiction to issue the prerogative writ of mandamus to compel the performance of the duty of County Registrar, and it seems also that the issue of such a writ, where the complaint of the applicant is well founded, is a proper exercise of the discretion of the court.

It remains for me to enquire whether, according to the legal construction of the registry laws of this country, the Registrar is in duty bound to make entry of the certificate of discharge of the mortgage, as regards a portion of the lands mortgaged, in the manner and form required of him in this case.

The statute 35 Geo. III. cap. 5, authorized the establishment of Registry Offices for the enregistering memorials of all deeds and instruments by which lands within the Province of Upper Canada, might be transferred or disposed of by bargain and sale, enfeoffment, gift, devise, mortgage, or exchange; section five contains the only directions as to the mode of registering: "And that every such deed, conveyance, and will, and probate of the same, of which such memorial is to be registered as aforesaid, shall be produced to such registrar, or his deputy, at the time of *entering such memorial*, who shall endorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time, on which such memorial is entered and registered, expressing also in what book, page, and number, the same is entered;" "and that every page of such register book, and every memorial that shall be entered therein, shall be numbered, and the day of the month, and the year, and hour, or time of the day when every memorial is registered, shall be entered in the margins of the said register book and of the said memorial."

The ninth section provided for the registrar's fees in proportion to the number of words contained in every memorial entered, and every certificate given out of the office.

Forms of memorials are given in the schedule of the act, and with these will be found a form of certificate that mortgage money has been paid, the same certified by the mortgagee, which concludes with these words: "and I do hereby require an entry of such payment and satisfaction to be made pursuant to the act, &c."

Then follows a form of memorandum: "That upon the certificate of the within named (mortgagee), dated and proved, &c., that all moneys due on the within mentioned mortgage are duly paid and satisfied in discharge of the same, this entry, in discharge thereof, is made pursuant to the said act of the legislature."

This statute was silent as to the place or mode of entry of the certificate, or of the memorandum, as well as to their legal effect. It is to be supposed, however, that they were intended as a notice to all whom it might concern of the

payment of the mortgage money, before or after the time specified in the condition of the mortgage: the certificate seems to me to have been intended as a memorial of the fact of payment, to be registered and entered in order as received by the register; and the memorandum as an indorsement upon the mortgage to be made by the Registrar, like the certificate or memorandum of registry made upon deeds of conveyance. I do not know, however, in what manner such certificates and memorandums have been in practice entered.

The statute 4 Wm. IV., ch. 16, enacted that any certificate by any mortgagee, his heirs, executors, administrators, or assigns, heretofore or to be thereafter given and registered under the provision of the former, should have the effect of a release or reconveyance.

From the use of the word "registered," as applied to the certificate, and from analogy with the case of a memorial, I should suppose that what was intended was the entry or copying at full length the certificate into the register book, like any memorial, in the order in which it was received.

By the statute 9th Vic. ch. 34, the act 35 Geo. III. ch. 5, was repealed, and in great part re-enacted. The 23rd section enacts: "That when any registered judgment or mortgage is satisfied, it shall and may be lawful for the Registrar or his deputy (on receiving a certificate in the form in the schedule to this act marked A., in respect to mortgages duly proved by the oath of a subscribing witness) to write the word "discharged" and affix his name on the margin of the register wherein the said judgment or mortgage is registered, which shall be deemed a discharge thereof; and such certificate or satisfaction process shall be filed, numbered, and entered on the margin of the register, under the word "discharged."

The certificate in the schedule is the same as in the repealed act 35 Geo. III. ch. 5, but there is no form of memorandum or certificate to be indorsed on the mortgage given.

The statute 14 & 15 Vic. ch. 7, sec. 8, enacts that the executor or administrator entitled to the money secured by a mortgage, &c., shall have power, on payment of the

principal and interest, &c., to convey, release, and discharge the said mortgage debt and the legal estate in the land, and such executor or administrator shall also have the same power as to any portion of the lands, on payment of some part of the debt, or on any arrangement for exonerating the whole or any portion of the mortgaged lands, without payment of money ; and such conveyance, release, or discharge, shall be as effectual as if the same had been made by any person having the legal estate.

The question on which our opinion is sought for is, as to the mode of registering the certificate of discharge of part of the land mortgaged. It being insisted upon, on the one hand, that he is bound, in obedience to the act, to copy and enter at length in the margin the certificate of discharge. On the part of the Registrar, it is said that the executor should “ convey, release, and discharge,” by deed, releasing the portion of the land desired to be freed ; and moreover, that in case of mortgaged land being minutely sub-divided, with descriptions by abutments and boundaries in each deed disposing of the same, and of separate discharges of the portions of land as so disposed of, the entry of such certificates at length in the margin of the register book, would be wholly impracticable.

The concluding words of the 8th section of the statute in question—“ and such conveyance, release, or discharge, shall be as effectual as if the same had been made by any person having the legal estate ”—seem to point at a discharge which is neither a conveyance nor a release ; and, moreover, I see no reason to doubt but that the legislature intended the executor to have the same power of discharging by certificate, which the testator or mortgagee had ; and if such be the case, I am unable to suggest a reason (beyond possible want of space in the margin) for a different practice in the registry.

I think it would have been more regular, as well as more convenient, to have provided for the entry and registry at length, as in the case of a memorial, in the order received. The margin of the book is no proper place for the actual registry of instruments affecting title to land. Much of the

authenticity of register books, relating to land, marriages, births, &c., depends upon the unbroken line of entries in the order of their date, and upon the consequent difficulty or impossibility of interpolation at a future period ; but this safeguard is lost when a margin of a book is substituted for the sequent entries ; and thus danger of falsification might be much increased, if the Registrar were forced to add to the margin of his book, new or strange material, so as to enlarge it sufficiently to contain entries like that now required.

Nevertheless, it appears to me, that the intention of the law is plain, and that the Registrar cannot legally refuse to enter the certificate at length, as required.

As it is probable the parties have taken this mode of obtaining the opinion of the court, without a view to ultimate proceedings, I should say, if my brother McLean agreed with my opinion, that the writ of mandamus need not issue, if the Registrar pay the costs of this application.

My brother McLean, however, not concurring with my opinion as to the entry of the certificate at length, I see no other course than to make the rule absolute for a mandamus *nisi*, upon which the Registrar may return what he has done, and the question may be tried either upon plea or demurrer, and if thought fit, carried to a higher tribunal.

NOTE—McLEAN, J., and SULLIVAN, J., being of opinion that the Registrar was bound to register the discharge, but differing as to the mode in which it was to be done, directed that a mandamus *nisi* should be issued ; that after argument on the return, the opinion of the Chief Justice, who was not present during the argument on this rule, might be obtained.

LEYS V. BALDWIN & HILL.

Agreement for a lease—Covenants, &c.—Lease never executed.

The declaration sets out that A., by an agreement under seal, leased certain premises to B. and his assigns, and the declaration alleges by said agreement it was agreed between the said A. and B. that B. was to pay the annual rent of £10, and to get a lease of A. for twenty-one years, with a renewal or valuation at the termination thereof; said B. paying all expenses in case of a renewal. At the end of the second period, B. to receive no allowance for any improvements. Lease to be perfected with the usual covenants between landlord and tenant, at the request and expense of said B. That at the expiration of the first term of twenty-one years, B. applied to A. to execute a further lease for a renewal term of twenty-one years, at an annual rent of £10. A. refused to execute the lease, or to grant to B. any renewal further term, contrary to the said covenant or memorandum of agreement.

Demurrer—That the declaration shows no right which B. ever had to have a lease after the expiration of the time contained in the said memorandum of agreement, for the further term of twenty-one years, at the annual rent of £10.

Held, That the memorandum of agreement contains no covenant for the renewal of the term at the expiration of twenty-one years.

The declaration in this case, is for a breach of covenant, alleged to have been committed by the defendants. It alleges that by a certain memorandum of agreement made on the 18th of February, 1821, between one William Bowket of the one part, and one Frederick Kane of the other part, sealed with the seal of the said parties respectively, the said William Bowket did let and lease unto the said Frederick Kane, a certain plot of ground therein described (the metes and bounds being set out), and it was thereby agreed between the parties thereto, in the words following—that is to say, “The said Frederick Kane, his heirs, executors, administrators, or assigns, to pay to the said William Bowket, his heirs, executors, administrators, or assigns, ten pounds, of lawful money of Upper Canada, per annum, and to get a lease of the said William Bowket for twenty-one years, with a renewal or valuation at the termination thereof, said Kane paying all expenses in case of a renewal; at the end of the second period to receive no allowance for any improvement. Said Kane is not to erect or cause to be erected either an iron foundry or blacksmith’s forge. Rent to commence on the 1st day of March, 1821. Rent to be paid quarterly. Lease to be perfected with the usual covenants between landlord and tenant, at the request and at the expense of the said Kane.”

The declaration then alleges, that after the making of the said memorandum of agreement, the said Frederick Kane

entered into the possession of the said demised premises, and remained and continued so in possession until afterwards, on the 13th September, 1822, by a certain indenture of assignment then made, between the said Frederick Kane and one John Leys therein named, which indenture plaintiff cannot produce, being in the possession of the defendants, the said Frederick Kane absolutely assigned, transferred, and set over unto the said John Leys, the said memorandum of agreement, and all the estate, right, title, and interest of him, the said Frederick Kane, in and to the premises aforesaid; and the plaintiff further saith, that the said John Leys thereupon entered into the possession of the said premises, and remained and continued in possession thereof until the 1st day of December, 1845, when he departed this life, having first made his last will and testament, in due form of law, whereby he nominated and appointed as the executor thereof, the said plaintiff, to whom he devised the said memorandum of agreement, and all his estate, right, title, and interest, in and to the said premises, by virtue of which said demise, the plaintiff, immediately after the death of the said John Leys, entered into the possession of the said premises, and has ever since remained and continued, and still is in such possession; and after the making of the said memorandum of agreement, to wit, on the 1st day of January, 1851, all the reversion, estate, right, title, and interest of the said William Bowket, passed to and vested in the defendants, who are still seized thereof as of fee, and that the said term of twenty-one years so granted to the said Frederick Kane, as aforesaid, expired on the 18th day of February, in the year of our Lord, 1852, the said annual rent of £10 having been duly paid during the said term. And the plaintiff further saith, that after the expiration of the said term, to wit, on the 19th day of February, 1852, the plaintiff requested the defendants to sign, seal, and execute unto him, the said plaintiff, a further lease of the premises for a renewed term of twenty-one years, from the day and year last aforesaid, at the annual rent of £10, and subject to the conditions and covenants in the said memorandum of agreement mentioned and specified, and for that purpose tendered to the defendants for

execution, a lease duly prepared at the expense of the plaintiff, in accordance with the terms of the said memorandum of agreement, and containing the conditions, exceptions and *covenants* in the said memorandum of agreement mentioned, and then requested the defendants to execute the same; yet the defendants then refused to execute the same or any other lease, or to grant to the plaintiff any renewed further term of the said premises, on any terms and conditions whatever, contrary to the said covenant and memorandum of agreement—to the plaintiff's damage of £500.

Demurrer to this declaration. Causes assigned—That the declaration shews no right which the plaintiff ever had to have a lease after the expiration of the time contained in the said memorandum of agreement, for the further term of twenty-one years, at the annual rent of £10, and that the declaration is, in other respects, insufficient.

This demurrer was argued in Easter Term last; and *Wilson*, Q. C., for the demurrer, contended that by the terms of the memorandum of agreement, admitting it to amount to a lease for twenty-one years, the defendants are entitled to elect, at the expiration of that period, whether to grant a further term, or have a valuation of the tenant's improvements and to pay him for the same; that the memorandum of agreement contains no covenant binding on the defendants, such as that which the plaintiff has set out, inasmuch as it purports only to be a memorandum of an agreement for a lease, to be executed at a future period, to contain certain covenants, one of which was to be for a further renewal at the expiration of the term, or a valuation of improvements at that time; the plaintiff not having obtained or asked for a lease with such a covenant, he cannot treat the agreement for such a lease as if it contained a covenant which was to be inserted in the lease; that there is nothing in the agreement to shew for what period a renewal was to be given at the expiration of twenty-one years; and that, as the law cannot attach to the word *renewal*, any definite meaning as to the extent of a term, and parol evidence cannot be received to explain it, the agreement, even if it stipulated for a renewal is too

uncertain, and cannot, in a court of law, be enforced for any specific term.—Guthing v. Lynn, 2 B. & A. 232; Hitchin v. Groom, 5 C. B. 515; Saunderson v. Piper, 5 Bing. N. S. 425; Williams v. Jones, 5 B. & C. 108.

Eccles, in support of the declaration, contended, that the memorandum of agreement declared on was, in fact, a lease for the term of twenty-one years (Woodfall's Landlord and Tenant), and that it contains a statement that Frederick Kane was to get a lease of William Bowket for twenty-one years, with a renewal or valuation at the termination thereof, that must be regarded only as a covenant for further assurance, in case the tenant require it: that the instrument being a lease, such further assurance became unnecessary (*Rubery v. Jervoise*, 1 T. R. 229): that by the agreement the lease was to contain the *usual covenants* between landlord and tenant, but that a covenant for a renewal of the lease at the expiration of the first term is not an usual covenant (3 N. & M. 137), and therefore the agreement contains such covenant independently of the lease which was to have been executed. He also urged that the plaintiff is the party entitled to the option to take a renewal of the lease or a valuation of improvements, and that the defendants are bound to give one or the other as plaintiff may require.

McLEAN, J.—The plaintiff's right to recover or to sustain his action depends upon the legal construction of the instrument on which he professes to found his declaration. He treats it as containing a covenant running with the land and binding on the defendants, as the holders of the reversion derived from Bowket, the original lessor. Now the instrument contains no covenant for a renewal of the term at the expiration of twenty-one years. It bound Bowket to execute a lease which would contain such a covenant; and if the plaintiff's term were still unexpired, he would have a right to ask the defendants to execute a lease containing such a covenant. He, and those who preceded him, were content to hold for a period of twenty-one years, as appears by the declaration, under an agreement which they allege was a lease; but whether a lease, or merely an agreement

for a lease to be executed *in futuro*, unless it contains a covenant for an extension or renewal of the term at the expiration of twenty-one years, this action cannot be sustained. An agreement to execute a lease for twenty-one years, and that at the expiration of that period a further specific term would be granted, would be binding on the defendants; and though the original lease were omitted to be executed, the agreement still held for the extension of the term. But here the stipulation is not that at the end of twenty-one years the lessor will execute another lease for a further period, but that during the first term a lease will be executed *under which* the lessee will be entitled to claim a renewal or valuation. The plaintiff now asks for a renewal without having obtained any lease, and strives to convert the agreement for a lease into a covenant for a renewal. Kane, from whom plaintiff derived his title, was to get a lease from Bowket for twenty-one years, with a *renewal or valuation* at the termination thereof, Kane paying all expenses *in case of a renewal*, and at the *end of the second period* to receive no allowance for any improvements. The words "*in case of renewal*" show, I think, that the granting of a renewal was uncertain, even had the lease been executed to correspond with the terms of the agreement: and the words "*with a renewal or valuation*," show that the lessor was to have the option either to renew the lease or to have a valuation of improvements. At the *expiration* of the second term, in case of renewal, the lessee was to get nothing for his improvements; and hence it must be inferred, that if such renewal were not made, he would be entitled, at the expiration of the twenty-one years, to obtain compensation for improvements made before that period. The construction of the instrument appears to me to be that which corresponds with what is well known to be the constant practice in such leases, that the landlord intended to make a lease for twenty-one years, reserving to himself the right of extending the term for a further period, or to put an end to the holding at the expiration of twenty-one years by paying to the lessee the value of his improvements.

There is, however, no covenant which is binding on the

defendants to grant a renewal of the lease: and as under any circumstances they would have the option to do so or to pay the value of improvements, if the lease containing the proposed covenant had been executed, the declaration would be bad on general demurrer, the plaintiff claiming one thing only to be done, when the defendants would have a right to do either of two things, as might suit their convenience.

Whether the instrument declared on amounts to a present demise, or only to an agreement for a lease, appears in this case to be unimportant—that must depend upon the terms of the instrument and the intention of the parties; but my opinion at present is, that it can only be looked upon as an agreement for a future demise. It bears date on the 18th February, 1821, and a lease was to be made for twenty-one years, and the rent was to commence from the 1st March, 1821. The term and the rent must be presumed to have commenced together, and if so, the agreement of the 18th February was to take a lease to commence *in futuro*, and would not amount to a present demise. Doe dem. Morgan v. Powell, 7 M. & G. 980; Morgan v. Bissett, 3 Taunt. 65; Jones v. Reynolds, 1 Q. B. 506; Doe dem. White v. Simpson, 5 T. R. 163; Poole v. Bentley, 12 East. 168; Bicknell v. Hood, 5 M. & W. 104; Chapman v. Towner, 6 M. & W. 100; Brashier v. Jackson, 6 M. & W. 549; Sutherland v. Pratt, 11 M. & W. 307. On these grounds I think the judgment must be for defendants.

SULLIVAN, J.—It appears to me that the declaration is bad, for several substantial reasons.

The memorandum of agreement, as declared upon, is probably a demise from year to year; but it is not the lease undertaken to be given, to be perfected with the usual covenants between landlord and tenant, and at the request and expense of the said Kane.

It is not, that I can see, a lease for twenty-one years, though it may be a lease for one year, or from year to year.

It is the lease which was undertaken to be given for the twenty-one years which was to contain a covenant for renewal.

The tenant does not appear ever during twenty-one years to have requested a lease.

Even if a lease had been executed, the stipulation would not have been for a renewal, but for a renewal or valuation.

The valuation here meant is explained by the words subsequently used, "at the end of the second period to receive no allowance for any improvements;" which expression shews that at the end of the first term the landlord should not renew, the tenant was to have a valuation of improvement; and if this be the true construction of the instrument, the breach should have been in the alternative, if the present action were sustainable at all.

In the case of *McLean v. Young*, 1 U. C. C. P. Rep. 63, the intricate question of lease or no lease is discussed at great length, and almost every reported case is cited and remarked upon. *Doe Baily et al v. Foster*, 3 C. B. 215, is a late case on the subject.

The declaration before us states that a memorandum of agreement was sealed by the parties, whereby William Bowket *did* let and lease. This is an averment of the legal effect of the instrument; what the actual contents of the portion of the instrument relied upon as a demise, we do not know. I take it, therefore, that at present the agreement must be considered a demise, but the length of the term is not stated. The superadded agreement is not the demise; that is, not a lease but an agreement for a lease, though contained in the same paper with what is stated as a demise. It is the lease which Kane was to get which was to contain the undertaking for a renewal or valuation, and that not having been demanded or granted during the term, nor till long after the expiration of it, I think that the plaintiff's right is gone.

The case of *Alderman v. Neate*, 4 M. & W. 704, comes, I think, nearer to support the plaintiff's view of this instrument than any I have seen, but it does not go far enough. There the agreement was in itself a lease for a specific time, without the aid of the lease which was to be granted as a further assurance.

Judgment for the demurrer.

STEVENSON & STEVENSON V. GILDERSLEEVE.

Qualification of agreement.

Declaration.—Special assumpsit upon an alleged special contract to carry safely for hire certain goods of plaintiff's, the dangers of the navigation excepted, and for breach; assigning the damage of the goods through the negligence of the defendant and his servants, and not by reason of the dangers of the navigation. *Plea*,—Non-assumpsit. On the defence the defendant proved that, although he undertook to carry for hire, he so undertook at the plaintiff's risk, and the evidence having been left for the jury, they found on this point for the defendant.

Held.—That the qualification as proved went to the foundation of the agreement, and the liability consequent thereupon, and exempted the defendant from any damages or liability in respect of the contract.

Appeal from the County Court of the United Counties of Frontenac, Lennox, and Addington.

Special assumpsit. Writ issued 7th November, 1851; Declaration, 8th December, 1851.

The first count states, that the defendant was owner of a steam vessel called the Henry Gildersleeve, in the Kingston harbour, and bound from thence to Belleville, and that plaintiffs, at the request of defendant, caused to be shipped and loaded on board the said vessel divers goods, consisting of cabinet furniture, &c., in good order, to be *safely and securely carried and conveyed* by defendant, as owner, from Kingston aforesaid, to Belleville aforesaid; and then *to be safely and securely delivered*, in like good order, for the plaintiffs, *the dangers of the navigation only excepted*; and in *consideration* thereof, and of certain freight and reward to the defendant in that behalf, he, defendant promised the plaintiffs to take due and proper care of, and *safely and securely carry, convey, and deliver*, the said goods as aforesaid: the dangers of the navigation only excepted—*yet* that defendant, not regarding his duty in that behalf, nor his said promise—although no dangers of the navigation prevented him, &c.—took so little and so bad care of the same, that by and through the negligence and improper conduct of defendant and his servants in that behalf, the said goods became and were greatly injured and damaged.

The second count is substantially like the first as respects the contract to carry and the breach thereof.

The third count states that, in consideration of the plaintiffs having delivered to defendant certain furniture in good

order, to be *safely carried*, &c., in a certain steam vessel, &c., and to be *safely delivered*, in like good order, for certain freight and reward, &c., defendant promised plaintiffs to take due and proper care of said goods whilst he had the care and custody thereof; yet defendant took so little and so bad care thereof, that by the carelessness, negligence, and improper conduct of defendant, the said goods became, and were wholly lost to the plaintiffs.

Plea.—Non-assumpsit, and issue.

The evidence for the plaintiffs was, that on the 6th of June the furniture was sent from the plaintiffs to Mr. Ware's wharf, at Kingston, to be shipped for Belleville—the steamer Prince of Wales being the vessel it was at first intended to be sent by: that on the following day (7th of June) Mr. Ware's clerk shipped it on board the Gildersleeve in presence of Mr. Chambers, the master, who superintended in putting it on board, &c.: that Mr. Ware's clerk, on that occasion, delivered a shipping bill, or bill of lading, being dated the 6th of June, to the purser of the steamboat or to the master, which imported on the face of it that the goods were shipped by Mr. Ware in good order, and which Chambers, the master, promised to deliver in like good order, dangers of the navigation excepted; but it was not signed by the purser, or master, or any officer of the boat, nor by any one else as agent of defendant; nor were all the blanks filled up, such as who was to pay freight, and the owner's name—the name of the consignor was inserted. To rebut the inference that the furniture was shipped at the defendant's risk, Chambers was called as a witness, and said, that on the 5th of June he saw one of the plaintiffs at Kingston, near the boat, who asked him about taking up furniture for him, upon which the witness said that he had had some trouble with his (plaintiff's) agent in Belleville, and had refused to take any more except at his (plaintiff's) risk; and to which the plaintiff replied that it must go at all events, and that he (witness) took it at his risk: that on the 7th of June he found the furniture there, and helped to put it carefully on board, and at the same time told the

mate it was going at the risk of the shippers. To repel this the plaintiff, Sylvester Stevenson, was sworn as a witness, and said, that Chambers never told him *before* the furniture was shipped that it was to be carried at the plaintiffs' risk : that he had no conversation with Chambers about shipping it *before* it was sent : that he did tell him *after* that, not *before* : and that after the injury was done he carried furniture at the *plaintiffs'* risk.

Herrick, the plaintiffs' agent at Belleville, said, that Chambers, *afterwards*, when he (witness) went to look for some furniture, told him a load had been brought to the wharf, and they refused to take it, unless the plaintiffs would run their own risk, as the damage done to a former load would more than balance all their freight for the season, and once asked this witness how much the damage was, and was told 50*l*. There was added evidence upon the same point, but less specific. There was also evidence to shew negligence. The case was then left to the jury, who found for the defendant.

Spafford, for the appellant (plaintiff below), contended, that the defendant, though not declared against as a common carrier, was proved to be one, and is alleged to have undertaken to carry safely for hire ; and that the present declaration is according to the course now usually adopted, and is founded upon the contract : that negligence will support the action, notwithstanding a notice—or in other words, and agreement partially limiting the common law liability of a carrier for hire : that *prima facie* defendant was in the nature of an insurer, and that negligence repelled any qualified or limited responsibility as to risk, that was set up by way of defence—Smith's Mercantile Law ; Smith v. Horne, 2 Moore 18, 8 Taunt. 144 S. C. ; Forward v. Pittard, 1 T. R. 27, a case against a common carrier ; Bennion v. Davison, 3 M. & W. 179 ; Dale v. Hall, 1 Wil. 281, assumpsit ; Selwyn, N. P. 422 ; Leys, N. P. 533 ; Duff v. Budd, 3 B. & B. 188, case against a carrier ; Smith v. Horne, Holt, N. P. C. 643 ; Birkett v. Willan, 2 B. & Ald. 356 ; Garnett v. Willan, 5 B. & Ald. 53 ; Wright v. Snell, *ib.* 350 ; Sleat v. Fagg, 5 B. & A. 341 ; Owen v.

Burnett, 4 Tyr. 143 ; 2 Car. & Mar. 353 ; Bodenham v. Burnett, 4 Price, 31 ; Coggs v. Barnard, Smith's L. C. 209 ; Cam. Rules, 54 : that the plea of non-assumpsit denies only the receipt of the goods : that nothing special was agreed upon at the time of shipment ; it was only alleged that a previous notice had been given two days before that the goods would only be carried by defendant's vessel at the plaintiffs' risk : that such a notice may be repelled by proof of neglect, which was proved : that the captain left the boat at Adolphustown, which was evidence of negligence—Langley v. Brown, 1 N. & P. 183 ; Hawkes v. Smith 1 Car. & Mar. 72 ; 4 Bing. 208 ; Beeston v. Collier, 12 Moore, 444 ; Wright v. Snell, 5 B. & C. 350, 4 M. & P. 540 ; Ellis v. Turner, 8 T. R. 531 ; Siordet v. Hall, 4 Bing. 607 : that the furniture not being boxed up makes no difference, the question being whether there was negligence, shipped as it was.—Stuart v. Crawley, 2 Star. 326 ; Brind v. Dale, 8 C. & P. 212 ; Beck v. Evans, 16 East. 244 ; DeRothschild v. Royal Mail Steam Packet Company, Ex. 2nd of June 1852 ; Angell on Carriers, 70 ; 15 Jurist, 1106.

Gildersleeve, for the respondent, submitted that the defendant was not declared against as a common carrier, but upon a special contract.—Pozzi v. Shipton, 8 A. & E. 974 ; Robinson v. Dunmore, 2 B. & P. 416 ; Brown v. Gatcliffe, 3 M. & G. 688 ; 1 Sel. N. P. 327, (b) ; Story on Bailments, 3 Edn. S. 510 ; that it therefore depends on the terms of the contract, and the evidence shewed a variance in the statement thereof, and so the defence under the general issue was established—15 Ju. 1106 ; 13 Ju. 385 ; Story on Bailments, 3 Edn. 492, 563 : that boxing was material—3 Esp. 74 ; Brind v. Dale, 8 C. & P. 76 ; Latham v. Rutley, 2 B. & C. 20 ; Clarke v. Gray, 6 East. 564 ; Hinton v. Dibbin, 2 Q. B. 646 ; Boys v. Pink, 8 C. & P. 361.

MACAULAY, C. J.—I think the appeal should be dismissed. It was very fully and well argued by Mr. Spafford in support of the appeal ; but he has failed to convince me, as contended, that the case was to be determined upon the issue joined by analogy to exemptions of common carriers

who had limited their responsibility by notices, &c., as against whom negligence would be admissible to establish a general liability notwithstanding such notices. Common carriers are, no doubt, to a great extent liable as insurers.—*Coggs v. Barnard*, Smith's L. C., 209; *Brind v. Dale*, 8 C. & P. 207; 2 M. & W. 775, S. C., 4 Bur. 2300, Carth. 485, 1 T. R. 27. And so a person not a common carrier undertaking to carry safely for hire, may incur a co-extensive responsibility in many, though perhaps not in all respects, and which responsibility extends to losses arising from negligence of himself or servants.—*Robinson v. Dunmore*, 2 B. & P. 414. But the distinction is to be observed between actions on the case for negligence against common carriers, founded on their common duty to carry safely, and the breach of such duty, and special actions of assumpsit against common carriers, stating them to be such, founded on their contract; and special actions of assumpsit against persons not common carriers, or not alleged to be such, but declared against upon special undertakings to carry for hire, or to carry safely for hire, and against whom negligence is assigned by way of breach; also in reference to such actions, the difference, as traverses, between pleas of not guilty in case, and of non-assumpsit in actions on the contract.

Here the defendant is not declared against as a common carrier at all; the action is not a case for negligence, but a special assumpsit upon an alleged special contract to carry safely for hire, the dangers of the navigation only excepted, and for breach assigning the damage of the goods through negligence of the defendant and his servants, and not by reason of the dangers of the navigation. To the declaration, containing three counts, the defendant simply pleads non-assumpsit; thereby, according to the new rules, denying only the express contract, or premises, alleged, &c.—*Cameron's New Rules*, 52, 54; where it is said, that in actions against carriers for not keeping goods safe, this plea will operate as a denial of any express contract to the effect alleged in the declaration, but not of the breach. So the converse, not guilty in case, operates as a denial only of the breach of duty, or wrongful act, alleged to have been com-

mitted by the defendant, and not the facts stated in the inducement; and as respects a carrier, it will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant, as carrier for hire, or for the purposes for which they were received.—Cameron's Rules, 57, 58, 60, and 61: 6 Bing. N. S. 686; Syms v. Chaplin, 5 A. & E. 634; Webb v. Page, 6 M. & G. 196. The plea, therefore, only denies the express contract alleged, and not the negligence; and the question is, whether at the trial the plaintiff proved such a contract.

There was, in the way the goods were shipped, *prima facie* evidence of an implied contract to carry for hire, subject to whatever obligations or exemptions the law ascribes to such a contract. But in the defence, evidence was offered to shew that the defendant did not, as alleged, undertake to carry safely, subject only to an exception stated in the declaration; but that though he did undertake to carry for hire, he only so undertook at the plaintiffs' risk, and, therefore, did not promise to carry safely, or to be responsible for all risk, save only the dangers of the navigation, as alleged. And the evidence being left to the jury, they found for the defendant in this point of the case. It was contended on the application for a new trial, and is now contended, that the alleged qualification of the contract, or exemption from risk, did not form any part of an isolated single agreement, but only became incorporated with the agreement, implied by law for the receipt of the goods, by the agents of the defendant, common carrier, to carry for hire, by reason of a previous notice, not general or public, but verbal and special, to the plaintiffs, that the defendant would not carry their goods of the kind in question except at their risk, and that the goods were shipped upon that previous understanding. From which it was inferred that the notice operated as a qualification of liability, like notice of common carriers restricting their responsibility as to goods above a certain value, or beyond a certain amount of damages, unless entered and paid for accordingly; and that, like such notices, the effect might be repelled by proof of gross negligence, and which, therefore, the plaintiffs'

counsel claimed a right to prove, and contended he did prove I do not, however, think that the analogy holds, under these pleadings and the new rules. It was not a notice limiting the liability to pay damages to a certain sum, or to goods exceeding a certain value; but a notice exempting from any damages or liability at all, and going to the foundation of the agreement, and the liability consequent thereupon. The case of *Latham v. Rutley et al.*, reported in 2 B. & C. 20, and D. & R. 211, shews clearly the difference between the two classes of notices. That was an action of special assumpsit against the defendants as common carriers, for not safely carrying a parcel containing promissory notes of large value; plea, the general issues. Except that the defendants are stated to have been common carriers, the declaration is very like the first count in the present one. It appeared in evidence, that the defendants' receipt for the promissory notes engaged to deliver them safely, fire and robbery excepted. And it was submitted that this exception not being introduced into the declaration, constituted a variance; and upon leave reserved the plaintiffs were nonsuited in *banc.*, though the loss was occasioned by negligence only, and not by fire or robbery. In the course of the argument, Abbott, C. J., remarked, that such an exception from the common law liability as the law itself, would sanction (meaning as the act of God or the Queen's enemies), need not be set out; but that was not such an exception, for by the common law, the defendants would be liable for a loss either by fire or robbery. Again, he asks, "are you warranted in calling the exception here a proviso? was it not rather a part of the receipt? The contract was certainly a qualified one, &c." Holroyd, J., said the goods were never received upon the common law liability, but upon the terms of a special and qualified contract, which should be stated. The case of *Clark v. Gray*, 6 East. 564, being cited, Abbott, C. J., in accordance therewith, said the result of the cases is, that if the carrier's notice is that he will not pay more than £5 upon any goods, it limits the amount of the liability only, and need not be set out in the declaration; but if it is that he will not pay anything upon

goods which exceed £5 in value ; then it limits the liability altogether, and is such a special exception as must be set out, &c. In that view, did not plaintiffs fail, as well upon the merits as in form ? Bayley, J., said, there never was any general contract between these parties ; the exception was always part and parcel of the contract. In giving the judgment of the court, Abbott, C. J., said, the distinction attempted to be established between an exception and a proviso is very subtle, and was not relied upon at the trial ; and repeated, that if the carrier only limits his responsibility, (meaning in point of damages or amount,) that need not be noticed in pleading ; but if a stipulation be made, that under certain circumstances, he shall not be liable at all, that must be stated ; and that the averment in the declaration was inconsistent with the contract as proved in evidence. It was not contended in that case that negligence in the execution of the contract after it was made, and while executory, could reflect back and operate upon the contract itself, so as to alter or affect its terms or obligations.—See *Tempany v. Barnard*, 4 Cam. 20.

In *Clark v. Gray*, 6 East. 570, Lord Ellenborough lays down this comprehensive rule ; that it is sufficient to state so much of any contract, consisting of several distinct parts and collateral provisions, as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration, and the rest of the contract which only respects the liquidation of damages, after a right to them has accrued by a breach of contract is matter of evidence in reduction of damages, but not necessary to be shewn on the face of the record—approving of *Clary v. Willan*, 2 H. B. 298, which was a case of total exemption by a general notice where goods were not entered according thereto.—*Carth.* 485 ; 2 Stan. V. P. C. 461 ; *Shaw v. The Northern Railway Company*, 13 Jur. 385 ; *Chippendale v. The Lancashire Railway Company*, 7 Eng. Rep. 395, 15 Jur. 1106 ; *Austin v. Manchester, &c. Railway Company*, 5 Eng. Rep. 323, 15 Jur. 670, 20 L. J. 96, 400, are cases all favoring the opinion I have expressed.

It was contended, as another view of the subject, that

admitting the goods to have been shipped as alleged in the defence, the meaning of their being carried at the plaintiffs' risk did not include exemption of the defendant from negligence, or, at least, from gross or wilful neglect on the part of himself or servants on board the steam vessel ; but that if loss accrued therefrom, it was not within the exception, which only extended to what might be called constructive or implied neglect, and not to positive, wilful, or gross negligence ; and, consequently, that such neglect as would avoid the exception might be proved. The case of *Garnett v. Willan*, 5 B. & C. 53, bears upon the point where the words, "*lost or damaged*," were considered as thus qualified—"the carrier doing nothing by his own voluntary act, or the act of his servants, to divest himself of the charge of carrying goods to their place of destination."—See *ib.* 60, the doctrine of *Holroyd, J.*

The answer seems to be that the force and effect of the exception is not now the question, but whether any exception materially qualifying the contract as stated in the declaration was proved ; for, if so, and gross or wilful neglect would nevertheless sustain the action, the plaintiff should have stated the contract as it was, and then alleged the neglect relied upon as not embraced by any of the exceptions. It is not a sufficient argument for omitting some of the exceptions, if material to any extent, that a breach of duty and misfeasance, or misconduct, on the defendant's part was alleged by way of breach ; that would have equally sustained the action had such omitted exceptions been inserted. The plaintiff should state the whole contract truly nevertheless, and the objection is variance in the statement thereof, not insufficiency in the breach.

Then it is said, defendant, being a common carrier, was bound to receive and carry the goods for reasonable reward in that behalf, and could not refuse without being liable to an action ; and that he could not by notice, verbal or written, curtail his legal responsibility, as claimed in this case ; that he had no right to insist upon, or to exact such immunity ; and that the saving of risk, or throwing the risk upon the owner, was void ; and if void, that it formed no

part of the contract, and ought not to have been stated, wherefore the contract was well laid, and proved as laid. There is, no doubt, force in this view; but when it is considered that special reasons induced the defendant to repudiate the risk, as explained in evidence, and that the furniture was shipped without being boxed or covered up, so that it was exposed to be injured conveniently by any evil disposed persons on board the vessel, I find no authority that satisfies me the defendant might not make such a condition if the plaintiff acquiesced in it, as the witness (Chambers) said he did.

Taking it, therefore, to have been competent to the defendant, under the circumstances in evidence, to make it a condition of receiving the goods to be carried that they should be at the plaintiffs' risk and not his, and that the defendant yielded thereto, and shipped them upon that understanding, (however, he might have refused to concur, or have maintained an action against the defendant, had he, after tender of the regular freight, refused to receive them on any other terms,)—8 M. & W. 372, 10 M. & W. 399—the sufficiency of the declarations may be tested by supposing the contract to have been stated in the terms contended for by the defendant; and as the jury found it was, with no other breach of duty or agreement than is contained therein, would it be demurrable or good in law? I apprehend it would be bad on demurrer, upon the ground that mere negligence, as alleged, would not suffice; however, gross, positive, culpable, or wilful neglect, if alleged, might do. If so, it proves the contract to be imperfectly stated in this declaration, for the declaration, on the face of it, is perfectly good, and the objection is one of variance, in the proof of the contract, arising under the evidence.

Of the various cases, relative to notices by common carriers, cited by Mr. Spafford, and others to which they refer, it is to be observed that many of them were before the new rules; that some were actions on the case in tort, on the common law liability of common carriers; and others in assumpsit, founded on the contract; some alleged to be entered into by the common carriers, others not so alleging;

but all alleging contracts to carry, or to carry safely for hire, and omitting any mention of notice that might qualify the nature or extent of the carrier's liability.

Under pleas of not guilty, in cases of non-assumpsit, before the new rules, less difficulty would arise than at present—as is clearly shewn by the case of *Wyld v. Pickford*, 8 M. & W. 444.

But the case of *Latham et al. v. Rutley et al.*, (ante) was long before the new rules, and has been relied upon since. See *Shaw v. The York and N. Mid. Railway Co.*, 13 Jur. 385; 6 Railway Cases, 87 Q. B. and 13 Q. B. 347.

It seems to have been considered, in many of the cases, that notices qualifying the liability of common carriers, whether in relation to damages only, or to total exemption, unless certain conditions were complied with, though accompanying the contract and operating upon it, was not so incorporated with it as to render it necessary to be stated in the declaration; but that it was only matter of defence, to be proved by the defendant, or (it may be since the new rules) specially pleaded—8 M. & W. 444 *supra*.

Among the cases on this subject, I may mention *Forward v. Pittance*, 1 T. R. 33; *Beck v. Evans*, 16 East. 244, case against defendants as common carriers; *Smith v. Horne*, Holt, N. P. C. 643; *Birkett v. Willan*, 2 B. & A. 356; *Batson v. Donovan*, 4 B. & A. 21; *Garnett v. Willan*, 3 B. & A. 53; *Owen v. Burnett*, 4 Tyr. 143; *Wyld v. Pickfield*, 8 M. & W. 444; *Benedict v. Arthur*, 6 U. C. R. 204. The opinion I feel bound to adopt from the whole is, that according to the evidence and the finding of the jury, the contract was not proved as laid, but is stated as more onerous upon the defendant than the facts warranted.

It is unnecessary, therefore, in any view of the appeal, to enter upon the evidence of negligence. Negligence is admitted in effect by the only plea pleaded, and the nature of the injury to the furniture was only material with a view to damages—unless, indeed, negligence could be proved exceeding the protection from risk alleged to have been contracted for—upon which I have already given my opinion.

Whether the captain's leaving the vessel at Adolphustown, and intrusting her to the mate, constitutes evidence of negligence, or what degree of importance the judge below attached to the bill of lading, are not material to be now decided. I am disposed to think some importance should be attached to the bill of lading as evidence, and as part of the *res gestæ*; and that the captain's conduct was some evidence of negligence; but whether the evidence went far enough to show gross or culpable neglect, sufficient to render the defendant liable notwithstanding the terms as to risk upon which the goods were received and carried, I express no opinion. Upon such a question, the way the furniture was secured, or exposed, or disposed of on board, &c., may be material.

As to the affidavits, I can only say, that we must deal with the case as reported to us from the court below. We could not, upon *ex parte* statements, import other facts or questions with it; and no authority has been cited shewing that this court could call upon the judge below to answer the affidavits, or that we can try the new facts therein suggested upon counter affidavits.

If the plaintiff had preferred it, the action might have been brought in one of the superior courts, under the inferior jurisdiction, and tried before a judge of assize. He, however, elected his court, and having submitted it to the county judge, he might, if dissatisfied with his ruling, or charge to the jury, have tendered a bill of exceptions thereto, and in that form have brought these points clearly under the review of a court of error or appeal.—*White v. Heslop*, 4 M. & W. 73; 4 N. S. 87, 89; 3 H. of Lds. Ca. 25; 16 Jur. 157. But not having done so, I do not think we can act upon affidavits, altering the aspect of this case as reported to us upon this appeal.

McLEAN, J., and SULLIVAN, J., concurred.

Appeal dismissed, with costs.

IN RE BELL V. THE MUNICIPALITY OF THE TOWNSHIP OF
MANVERS.*Indemnity to councillor.*

A by-law passed to indemnify a township councillor elect for the costs of a *quo warranto*, by which his election was set aside, is illegal.

This is a rule calling upon the defendants to shew cause why so much of the by-law of said municipality No. 76, and entitled "a by-law to assess the township of Manvers for general purposes for the year 1852," passed on the 29th April, 1852, as provided for the levying, assessing, and collecting the sum of 20*l.* to pay the costs incurred upon the trial of the controverted election held for ward No. 3 in the said township, mentioned in said by-law, should not be quashed with costs; on the ground that defendants had no power to assess the township for such purpose, and that such part of said by-law is illegal and void.

The by-law enacts that for the present year (1852) there shall be assessed, levied, and collected in and for said township, for the general purposes thereof for the year 1852, among others, the following sum—viz: 20*l.*, to pay the costs incurred upon the trial of the controverted election held for Ward No. 3 in the said township of Manvers; said trial was barratoriously, maliciously, falsely, and vexatiously instituted and brought up against the election of a township councillor to represent ward No. 3 in the municipal council of the township of Manvers, by Porter Preston, a defeated candidate, contrary to the unanimous vote and well known wish and intention of the said municipal council of said township, as expressed in by-law No. 60, passed upon the 1st December, 1851, ordering and directing said election to be held at Robert Giller's, and that it amounted in legal terms to an error in the judgment of the township councillors for the year 1851, and likewise of previous years, and that under these circumstances the said township is obliged to pay all law costs so incurred.

The second section of this by-law, directing the clerk to assess and apportion the sums to be levied upon all the ratable property, is not stated, as no objection has been made thereto.

The affidavit of Mr. *Scott* shews that the defendants were

no parties to the matter litigated, which was between Porter Preston as relator and A. Preston as a township councillor.

Weller shewed cause.

The following cases were cited on the argument—21 Ju. 888; *Regina v. Lichfield*, 10 Q. B. 555; 15 Ju. 554; *Weir v. Brown*, 20 L. J. Ex. 196, E. C. R.; 6 Ex. R. 312; **Regina v. Mayor of Leeds*, 4 Q. B. 796; 12 L. J. 369, Q. B.; *Regina v. City Council of Lichfield*, 7 Ju. 670; *Regina v. Stanford Council*, 13 L. J. N. S. 177; 8 Ju. 558; 8 Ju. 773; *Regina v. Dunn*, 5 Q. B. 959; *Regina v. Thompson*, 5 Q. B. 477; **Regina v. Mayor of Bridgewater*, 10 A. & E. 281; 3 Ju. 1123; **Regina v. Lichfield*, 4 Q. B. 894 (a); **Regina v. Mayor of Leeds*, 4 Q. B. 796.

MACAULAY, C. J.—The above reference (especially those marked *) shew that the by-law is an unauthorized application of the township funds. The council cannot apply them to support a contest or indemnify one party in a contest of the kind in question.

Had councillor Alexander Preston disclaimed, as he might have done, the municipality of the township might have intervened under the provisions of the act 13th & 14th Vic. ch. 64, sec. A. No. 23, subject to the provisions therein also contained respecting costs, but they did not do so; and Preston having defended the elections in his own behalf, the council cannot now indemnify him for the costs at the expense of the township. The by-law must therefore be quashed with costs.

MCLEAN, J., and SULLIVAN, J., concurred.

CITY BANK V. KELLAR & STEERS.

Promissory note—Materiality—Negative pregnant.

Declaration on promissory note alleged to have been made by the defendants under the name of A. B. & Co., promising to pay C. & D., who endorsed to plaintiffs.

Plea by A. B. that he did not make the note in the declaration mentioned as therein alleged.

Demurrer—Marginal causes stated to be that the plea tenders an immaterial issue, and that it contains a negative pregnant. The causes specially assigned are that the plea offers an immaterial issue, and that as in the declaration the defendants are charged as joint makers, it is no answer for one of them to say that he did not make the note, and that the plea contains a negative pregnant.

Held—That the plea traversing the making the note is clearly material, and that it does not contain a negative pregnant.

Two suits.—Writ issued 13th March and 21st April, 1852.

In the first the declaration is dated the 2nd June, 1852, and is upon a promissory note alleged to have been made by the defendants, under the name, style, and firm of T. M. Kellar & Co., on the 2nd December, 1851, promising to pay Matthews & Godrich, or order, 75*l.* 8*s.* 2*d.*, three months after date, who indorsed to the plaintiffs, &c.

Plea by Thomas M. Kellar (apparently in person) that he did not make the promissory note in the declaration mentioned, as therein alleged, concluding to the country.

Demurrer—Marginal causes, stated to be that the plea tenders an immaterial issue, and that it contains a negative pregnant. The causes specially assigned in the demurrer are that the plea offers an immaterial issue and that as in the declaration the defendants are charged as joint makers, it is no answer for one of them to say that he did not make the note, and also that the plea contains a negative pregnant, &c., but no reference is made in the margin to the causes specially assigned.

In the second—The declaration is dated the 4th of June, 1852, and is upon a promissory note alleged to have been made by the defendants, under the name, style, and firm of T. M. Kellar & Co., on the 16th December, 1851, promising to pay to the order of M. & G., &c., 54*l.* 1*d.* three months after date, and that M. & G. indorsed to the plaintiffs, &c.

Plea, by Thomas Miller Kellar, by *John Duggan*, his attorney—That he did not make the promissory note in the declaration mentioned as therein is alleged, concluding to the country.

Demurrer—Marginal causes stated to be that the plea tenders an immaterial issue, and that it contains a negative pregnant. The causes specially assigned in the demurrer are that the plea contains a negative pregnant, and also that it tenders an immaterial issue in this, that it denies making the note declared on, whereas the note is charged to be the joint note of the defendants; but no reference is made in the margin to the cause specially assigned.

Galt for the demurrer contended the pleas were bad;

the declaration alleging that the two defendants made the note and the pleas denying only that one made it. He cited and relied upon *Robertson v. Sheward*, 1 M. & G. 511, and note (a); *Commercial Bank v. Hughes*, 3 U. C. Rep. 360: that if partners, the other defendant might have made the note in the partnership name, binding upon both.

Duggan, in the first place, objected that the only causes of demurrer that could be relied on were those stated in the margin of the demurrer books, no reference being therein made to the causes assigned in the body of the demurrer, and that the causes stated in the margin were vague, too general, and insufficient—*Smith v. Church*, 2 Q. B. 835; *Buten v. Lawrence*, 20 L. J. Ex. 46: that stating a plea contains a negative pregnant is not sufficient without stating wherein it consists, and so of pleas tendering immaterial issues; contending therefore that the causes specially assigned could not be looked at he submitted that the pleas were perfectly good, being traverses of material matter, and not containing a negative pregnant as stated in the demurrer: that the defendant Kellar was only bound to defend himself, and does so effectually by denying that he made the note.—*Small v. Beaseley*, 3 U. C. R. 40; *ib.* 360; *Gourley v. Gun*, 5 U. C. R. 566; *Kirk v. Blurton* 9 M. & W. 284; 12 L. J. 117, Ex. S. C.; *Wilson v. Lewis*, 2 M. & G. 197; S. C., 3 C. B. 792; *Sigman v. Norton*, 11 Jur. 319; *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Ex. R. 381; *Musgrave v. Drake*, 5 Q. B. 185; *Robertson v. Sheward*, 1 M. & G. 511.

Galt, in reply, cited *Scott v. Chappelow*, 4 M. & G. 336, as to the marginal notes; *Park v. Davis*, 6 U. C. R. 411; *Faith v. Richmond*, 11 A. & E. 339; S. C. 9 L. J. Q. B. 97; *Levy v. Payne*, 1 Car. & Mar. 453; *Worley v. Harrison*, 3 A. & E. 669, where two defendants jointly plead that they did not make, &c.

MACAULAY, C. J.—Upon referring to the cases above cited, I think the pleas good. They do not traverse immaterial matter. If upon issue joined the verdict was for the plaintiff, he would be entitled to recover, for as against the other defendant he would have judgment by *nil dicit* or default—i. e. if he made no defence. If the verdict was

for the defendant, the plaintiff could recover no judgment against either. It would be the common case of an alleged joint contract denied by one only of the defendants, and whom the plaintiff failed to prove to be a party. He would fail to support the allegation of the defendants' promise. So here if the plaintiff failed to prove the defendant Kellar a party as maker of the note, he would fail to support the declaration, which alleges that he and another made it, and which cannot be true if the defendant did not make it. If debt upon a joint bond, if each defendant pleads separately *non est factum*, or some plead and others suffer judgment by default, the plaintiff on proving the several issues as to each separately, becomes entitled to judgment against all, and pleas of *non-fecit* by makers of promissory notes bear a clear resemblance. The plea of non-assumpsit before the new rules would be good by one defendant; and if, to support the declaration, it was necessary, according to *Grey v. Palmers*, 1 Esp. 135, and *Sherriff v. Wilks*, 1 East. 52, to prove that both or all the alleged makers made the note, in order to establish the allegation that they and the defendant made it; it would be only a question of evidence applied to the substance of the issue. But we are not here considering what evidence is necessary to establish the issue for the plaintiff. If a note declared upon as jointly made by two be denied by one, and only as to himself, and proof that he he did make it would be insufficient without proof that the other defendant made it also, the effect of the plea would be more comprehensive than its terms import, and amount to a plea that both did not make it. But it is not assigned as cause of demurrer that the plea amounts to a denial that the parties jointly, in effect, that neither of the parties, made the note. The objections are, that it traverses immaterial matter or offers an immaterial issue. The matter is clearly material; and if the result of a verdict either way would be to terminate the suit, it cannot be said to raise an immaterial issue. The other objection is, that it is a negative pregnant, meaning that although it denies that the defendant made it, it does not deny, and therefore is pregnant with the admission, that both made it; but

I do not see that it is pregnant with any admission invalidating the plea. If the defendant did not make it, they could not both have made it.

I think it is pregnant with the admission that the other defendant made it, and virtually throws upon the plaintiff the onus of proving that the defendant made it jointly with him. That may be done by proving his signature as a joint maker; or it may be necessary to prove a partnership, and that the other defendant as one of the firm made the note, so as to bind both. In either event, it is but evidence, and the question always would be, whether the defendant was a party as a maker—assuming that the other defendant was one—and if it appeared on the record that both were makers, as to one upon a judgment by *nil dicit* and as to the other by verdict, I am disposed to think a joint making would be established, as alleged, and the plaintiff entitled to judgment. The allegation of its being made in a partnership name is immaterial and might be struck out, it is only descriptive of the manner of making; and though it imports a partnership or joint name, I do not see that it can affect the rules of pleading, and I think one defendant may deny his making a note so declared upon just as well as if the partnership name had been omitted. The plea of *non fecit* under the new rules is analogous to the plea of *non est factum* in the denial of deeds which are always pleaded separately. The form of traverses in several of the cases referred to by Mr. Duggan are like the present, and as well where the defendants being joint parties is alleged to have been through the medium of a partnership name as when stated independently. The plea does not throw upon the plaintiff any greater burthen of proof than the plea of non assumpsit before the new rules would have done, and one of several joint defendants might have pleaded that he did not undertake or promise, as well as that they did not do so. If anything, it narrows the issue, and only imposes upon the plaintiff the necessity of proving that the defendant did make the note. Non assumpsit denies the alleged promise; *non fecit* denies the making of the instrument which contains the promise. In Chitty Jr.'s Forms,

mortgage in favor of the said James Mitchell, and that the p. 205 and No. 3, a form of plea of non assumpsit by one or all of several defendants is given, which if one only pleaded the form is that the defendants did not promise as in the declaration alleged.

This form of traverse is consistent with the effect attributed to it in the cases cited from 1 Esp. 135, and the doctrine of Lawrence, J., in 1 East. 52; but the plea of *non fecit* is a different kind of traverse, and of less comprehensive import and is in conformity with the new rules—Cameron's Rules, p. 55; Donaldson v. Thompson, 6 M. & W. 316; 11 M. & W. 475.

As to the want of marginal reference in the demurrer books to the causes assigned, the case of Scott v. Chappelow is material if it turned upon that objection.

We must presume the demurrer filed and served to have been correct, and it does not seem an objection to the demurrer books, further than that if necessary the argument would be postponed to supply the omission. Since, however, I think judgment must be against the demurrer it ceases to be important.

McLEAN, J., and SULLIVAN, J., concurred.

PHILLIPS V. MERRITT.

Damages.

In an action of assumpsit against the vendee upon a contract to accept a deed of conveyance of a vessel, and to give a mortgage security upon it for the purchase money, the declaration, which shewed a delivery of the vessel by the plaintiff to the defendant under the contract, alleged as a breach the *refusal of the defendant to accept* such deed; and averred, that by means thereof the vessel and its price had been lost to the plaintiff.

At the trial, the jury assessed the plaintiff's damages at the whole value of the vessel, and the court refused to disturb the verdict.

Assumpsit. Writ issued 12th March, 1851.

First count, on special agreement for the sale of a schooner called the "William Henry Boulton," setting out that heretofore—to wit, on the 22nd of August, 1850—in consideration that plaintiff, at the request of defendant, would sell to defendant a certain schooner or vessel of plaintiff's, then in plaintiff's possession, called the "William Henry Boulton," together with all and singular the apparel, tackle, and furniture, boats, oars and appurtenances to the said

schooner belonging, for the price or sum agreed upon between plaintiff and defendant—to wit, the sum of 500*l.*—and *would convey and assure the same* to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances save and except a certain mortgage thereof theretofore made by and between the said plaintiff of the one part and James Mitchell of the other part, upon which there was due to the said James Mitchell about the sum of sixty-two pounds ten shillings, which the plaintiff was to pay to the said James Mitchell; and in the event of the defendant being obliged to pay the same, or any part thereof, the same, or so much thereof as the defendant should pay, was to be taken to be a payment of so much of the purchase money of the said schooner. He (the defendant) then promised to accept the said schooner, together with the tackle, &c., to her belonging, and to pay to the plaintiff the price thereof—the said sum of 500*l.*—in manner following—that is to say, 166*l.* 13*s.* 4*d.*, part thereof, on the 22nd February, 1851; the further sum of 166*l.* 13*s.* 4*d.* other part of the said sum of 500*l.*, on the 22nd day of November, 1851; and the remaining sum of 166*l.* 13*s.* 4*d.* on the 22nd day of May, 1852, *together with interest on the whole sum remaining due at each time of payment of each of the said sums, at six per cent. per annum*; all the said instalments being subject to a deduction of any sum of money defendant should have paid to the said James Mitchell as aforesaid. And it was agreed by and between the said parties, that in order to secure to the plaintiff the payment of the said purchase money he (the defendant) should and would immediately, and within a reasonable time after the said sale and delivery to him by the plaintiff of the said schooner make and execute to the plaintiff a mortgage or conveyance of the same schooner, with her apparel, &c., conditional upon the payment by the defendant to the plaintiff of the price thereof with interest, in manner and at the respective times aforesaid; which said mortgage should contain a covenant by the plaintiff with the defendant that in case the plaintiff made default in payment of the moneys due or thereafter to become due on the

defendant should be called upon to pay or should pay to the said James Mitchell the moneys in the said mortgage mentioned, or any part thereof; that the said defendant should deduct and retain the same out of such sum or sums as should then be due to plaintiff on his mortgage, and that the plaintiff would credit the same as a payment thereon: and also, that, for the further securing to the plaintiff the payment of the said price or sum, the defendant should and would immediately, and within a reasonable time after the delivery of the said schooner to him, insure the said schooner and keep her insured in some good and substantial marine insurance office in the city of Toronto, for the sum of 300*l.*; and should, within a reasonable time after so insuring, procure a policy and assign the same to the plaintiff, to be by him held as collateral security. And the defendant then—to wit, on the day and year aforesaid—promised the plaintiff that, for the better securing of the said price to be paid to the plaintiff, the said defendant should make and deliver to the plaintiff three several negotiable promissory notes for the payment of the said price in manner and at the times aforesaid; the first of the said notes to be for the payment by the defendant to the plaintiff of the sum of 166*l.* 13*s.* 4*d.* on the 22nd day of February, 1851; the second of the said notes for the payment by defendant to plaintiff of 166*l.* 13*s.* 4*d.*, on the 22nd day of November, 1851; and the third of said notes to be for the payment by defendant to plaintiff of 166*l.* 13*s.* 5*d.*, on the 22nd day of May, 1852; each of the said notes to be payable with interest.

The plaintiff then avers, that in pursuance of the said contract, and in part performance thereof, he delivered the said schooner or vessel, with all the apparel, tackle and furniture, boats, oars and appurtenances thereto belonging, to the defendant, on the terms and for the consideration aforesaid: and the defendant then took, received and accepted the same from the plaintiff: that the said schooner, together with all the apparel, tackle and furniture, boats oars and appurtenances, were then free from all incumbrances except the mortgage made in favour of the said

James Mitchell, of which the defendant then had notice ; that defendant had then, and still had, full power to convey the same, and every part thereof, to the defendant, free from all incumbrances except the said mortgage to the said James Mitchell ; and although plaintiff was then, and from thence hitherto hath been, ready and willing to make and execute a good and sufficient deed of conveyance, or bill of sale of the said schooner, together with all and singular the apparel, &c., to the said schooner belonging, free from all incumbrances except as aforesaid, and willing and ready to do everything on his part to be done or performed by the said contract, and did on the same day and year first aforesaid, and on divers other days and times thereafter, and before the commencement of this suit, and within a reasonable time in that behalf, tender and offer to the defendant to execute, sign, seal and deliver to the defendant a good and sufficient deed of conveyance, or bill of sale of the said schooner, together with all and singular the apparel, &c., in manner and according to the terms of the said agreement, free from all incumbrances except the said mortgage to the said James Mitchell, and did cause and procure such deed of conveyance to be prepared ready to be executed by him the said plaintiff, which he the said plaintiff would then have executed, signed, sealed, and delivered to the defendant if he the defendant had not been discharged and acquitted the plaintiff from so doing—of all which the defendant then had notice ; and although plaintiff hath at all times performed all things on his part to be performed by the said agreement, yet the defendant did not then nor would ever accept or receive of and from the plaintiff such good and sufficient deed of conveyance, or bill of sale of the said schooner, or any conveyance thereof whatever, but hath hitherto neglected and refused so to do : by means whereof the plaintiff hath wholly lost the said schooner or vessel and the gains and profits which would have accrued to the plaintiff from the use thereof ; and the said schooner or vessel hath been out of the possession of the plaintiff and hath become, by the means aforesaid, wholly lost to the plaintiff ; and the plaintiff hath, by the means aforesaid,

been deprived of the whole price and value thereof, and of the interest thereon from the time of the making of the said agreement, and hath been otherwise injured and damnified ; and the said plaintiff hath also been forced and obliged to pay and become liable to pay a large sum of money, amounting in the whole to the sum of 25*l.*, for the drawing and preparing the said deed of conveyance or bill of sale, and for attendances and other services rendered to the plaintiff in and about the premises aforesaid.

2nd count—Defendant indebted to plaintiff in the sum of 1000*l.* for the price of a schooner, together with the apparel, tackle and furniture thereto belonging, sold and delivered by plaintiff to defendant at his request, and for work and labour and materials provided by plaintiff for defendant at his request, and for meat, drink, washing, lodging, goods, chattels, and other necessities found and provided by the plaintiff for defendant and divers others at the request of the defendant, and for money paid to defendant's use, goods sold and delivered by plaintiff to defendant, money had and received, wages due plaintiff as a mariner on board of defendant's vessel and on an account stated between plaintiff and defendant ; and thereupon the defendant, in consideration of the premises, promised the plaintiff to pay him the said last mentioned sum of money, yet the defendant hath not paid the same, to the plaintiff's damage of 1000*l.*

1st plea, filed 30th September, 1851—Non-assumpsit.

2nd plea, to the 2nd count—Payment before action brought.

3rd plea, filed 22nd April, 1852, to the 1st count—That he the defendant, being the buyer of the said vessel, apparel, tackle, furniture, boats, oars and appurtenances mentioned in the said 1st count, did not actually receive the same or any part thereof, nor was any note or memorandum in writing of the said bargain made and signed by the defendant, being the party to be charged by said contract, or by his agent thereunto lawfully authorized : and this defendant is ready to verify, &c.

Replication, to the 3rd plea—That the defendant did

actually receive the said vessel, apparel, tackle, furniture, boats, oars and appurtenances thereto belonging; concluding to the contrary. Issue thereon.

On the trial, before the Chief Justice, at the last assizes in Toronto, the plaintiff proved his case by his own testimony, corroborated by that of Mr. Dempsey, his attorney, and in some particulars by the testimony of Mr. Fiskin, one of the partners in the firm of Ross, Mitchell & Co. The plaintiff swore, that at the time of the sale of the schooner William Henry Boulton to the defendant—August, 1850—he was the registered owner, and he produced the custom house certificate in support of his statement. He stated, that he contracted at Wallaceburgh to sell the schooner to the defendant—the schooner being then there: the price, 500*l.* for the vessel and all that belonged to her, to be paid by three equal instalments, in six, fifteen, and twenty-three months; the first payment to be made on the 22nd February, 1851, with the interest: that there was a mortgage to Ross, Mitchell & Co., mentioned on the certificate of registry—62*l.* 10*s.*—which defendant was at liberty to pay, and to deduct from the amount of 500*l.*: that the defendant came to Toronto, and went with him to Ross, Mitchell & Co., and said he would pay the 62*l.* 10*s.*; that he had bought the vessel, and was to deduct it from the price: that defendant was to give a mortgage to plaintiff on the vessel to secure the price, and was to insure and assign the policy to the plaintiff. Plaintiff stated further, that he went with the schooner to Kingston with staves of defendant's: that the defendant considered the vessel in his possession, and that he was not to pay the plaintiff anything for her bringing the staves down: that the vessel was left in charge of the hands to be brought up from Kingston to Toronto, plaintiff and defendant coming up together in a steamer to get the documents made out: that after arriving in Toronto defendant proceeded homeward; and that plaintiff did not see him again till January following. A correspondence with defendant in the meantime took place, and several of defendant's letters of dates prior and subsequent to January were put in. Plaintiff, at defendant's request, engaged a

Captain Black to take up the vessel ; and in defendant's letter of 9th January to plaintiff, he enquires where the vessel was, stating that he had not heard from Captain Black since 3rd December : that on the 3rd December he was bound from Toronto to Port Sarnia : that on the 4th December the canal broke, so that he must be on Lake Ontario at somebody's expense. He requests plaintiff to see Captain Black, and authorizes him to receive some money which Captain B. had on hand, and desires the same to be placed to his credit. He expresses his desire that plaintiff would make a settlement with Black, and let him come home, as he wants to make arrangements for the next season's run ; and promises plaintiff next spring, as soon as the schooner can be got up to Sombra, to load her for Garden Island with staves, and give the plaintiff the whole proceeds in payment on the boat, both cargo and freight ; the other payments he says he will make as named in the writings, without any trouble. Plaintiff, in his testimony, stated, that he had not seen the vessel since spring, 1851 ; that he has not possessed her since he left her at Kingston : and that from the 22nd August, when he made the bargain on the St. Clair, he remained on board the vessel, employed by defendant. On cross-examination plaintiff stated, that the instalments were to be paid with interest ; that interest from the purchase was to be paid on each note ; that he did not intend to deliver the vessel to defendant till the mortgage was seen, and till the defendant got to the custom house at Toronto and found all right : that a memorandum in pencil was made at Wallaceburgh, not signed or intended to be, as they could do nothing till they got to Toronto ; nothing was paid down by defendant. The vessel, he says, was not to be delivered in Kingston, but in Toronto : while at Kingston defendant requested plaintiff to take the vessel to Portsmouth and have her hauled out and caulked, which the plaintiff did : Black was employed by defendant to take charge of the vessel when she returned to Toronto from Kingston. And plaintiff states at the close of his testimony, that he gave up the vessel to the defendant on his honour that he would come to Toronto and give the securities.

Mr. *Dempsey* proved that plaintiff and defendant came to him and gave instructions to have the necessary deeds and papers drawn to carry out the contract, the terms of which were stated to him and taken down by him at the time, the same as those stated in the declaration: that the papers were taken to Mr. Leith, for his opinion on them, by defendant; and that he afterwards declined to execute them, but gave no reason, though he understood that defendant could not pay and wished plaintiff to take back the vessel without paying any damages for plaintiff's loss of time and services, &c.

Mr. *Fiskin* proved, that, in January, 1851, defendant and plaintiff came to him to enquire about the mortgage to Mitchell: that defendant then said he had bought the vessel, and would pay the notes for which the mortgage was given as they became due.

No witnesses were called on the defence: and the learned Chief Justice, in his charge to the jury, stated, that he thought the agreement proved as laid, and a cause of action proved on the common counts: that possession was delivered; and if so, then the plaintiff was entitled to a verdict on all the issues. Then, as to damages, that no property passed, because the defendant would not perfect the transaction, and it was not shewn in what state the vessel then was, nor where she was, or that plaintiff's mortgage debt had been satisfied: that as to plaintiff's right to recover the 500*l.* though the title had not passed—if it was defendant's fault that he had not a title, and if defendant had taken possession, it appeared to him the jury might give damages to the amount of the price, in which case the defendant undoubtedly would have a right to claim the vessel and to insist on a title being made: that if the vessel were lost plaintiff surely should have the price, and he thought he could then recover the amount.

Under this charge and upon the evidence, the jury found for the plaintiff and 613*l.* 7*s.* 6*d.* damages.

Read, for defendant, obtained a rule to shew cause why the judgment in this cause should not be arrested, or why the verdict obtained in this cause should not be set aside

and a new trial had between the parties, the said verdict being contrary to law and evidence, and for misdirection of the learned Chief Justice, who tried the cause, or why a new trial should not be had on grounds disclosed in affidavits filed, or why the verdict should not be reduced to nominal damages or to such sum as the court may order.

In support of the application, defendant filed affidavits accounting for his inability to be present at the trial on account of illness and the difficulty of getting down at that season of the year: and he states, that he is informed and believes that he has a good defence on the merits, and will be able to procure the testimony of Black, the person who was present when the bargain was made, at the next assizes, should a new trial be granted.

Dalton shewed cause and filed affidavits against a new trial, and said, as to the ground for arrest of judgment, that it is not alleged in the declaration that defendant would not accept the schooner, but alleged that he refused to accept a conveyance, and contended that defendant's acceptance of a conveyance was essential to enable him to give the security according to the agreement—*Lush v. Russell*, 4 Exch. 637: and, as to the misdirection complained of, that the Chief Justice directed that defendant had excepted and taken possession of the vessel; and that the amount of damages was composed of principal and interest. *Dempsey* contended, that the contract was clearly proved, and the acceptance by defendant was in part performance; that defendant has the vessel, and cannot complain if made to pay the value.

Read, in reply, said—The judgment must be arrested, but that he was willing a nonsuit should be entered, the action having been brought the 9th March, 1851, when there was only one instalment due, and the plaintiff sued for the whole value, the second instalment being due 22nd November, 1851, and the last instalment 22nd May, 1852. Defendant was to give negociable promissory notes, a mortgage on the vessel, and the policy of insurance: that there was nothing to shew the vessel a registered vessel, in

which case only a bill of sale or conveyance necessary. Plaintiff alleges that the defendant discharged him from giving a conveyance, and the only breach assigned is, that the defendant would not accept a conveyance; the defendant's title might be good by delivery only and acceptance by defendant. Plaintiff alleges, that, from particular facts, he has been deprived of his vessel, but no breach of the contract stated in the declaration is assigned, no averment of the non-payment of the money or the not giving the notes.—Hobart 198 and 233; 7 Price 550; Bacon v. Simpson, 3 Exch. 77; 6 Saund. 645. Plaintiff admits, by his replication, that there was no contract in writing within the Statute of Frauds, by alleging acceptance, no contract concluded till defendant should come to Toronto to see if the title clear. From Wallaceburgh till they got to Toronto the possession was not under the contract, which was only to be completed at Toronto; that the Chief Justice misdirected the jury in considering such possession as acceptance, no acceptance shewn, prior to action brought, to satisfy the Statute of Frauds.—Bell v. Bament, 9 M. & W. 40; 3 Tyr. 26; Tempest v. Fitzgerald, 3 B. & Al. 680; Howe v. Palmer, ib. 321; Farina v. Horne, 16 M. & W. 122; Saunders v. Topp, 4 Ex. 389. As to measure of damages, misdirection, the title in plaintiff being a registered title and not transferred, the measure of damages should be what plaintiff has lost by defendant not completing his bargain.—Laira v. Pim, 7 M. & W. 474; Phillpotts v. Evans, 5 M. & W. 475; Boorman v. Nash, 9 B. & C. 145; Mussen v. Price, 4 E. 147; Shaw v. Holland, 15 M. & W. 136; 6 U. C. Q. B. R. 587; 16 L. J. C. P. 147; Hunter v. Parker, 7 M. & W. 323; 2 Y. & J. 278; 2 Hare 140.

McLEAN, J.—This case depends chiefly upon the issue raised by the defendant's 3rd plea to the 1st count, which is whether the defendant, being the buyer of the vessel, &c., did actually receive the same or not. On that part of the plea which alleges that no note or memorandum in writing of the bargain was made and signed by the defendant, being the part to be charged by the said contract, or by his agent thereunto lawfully authorized, no issue is taken, and it must

be taken as admitted that no such notice in writing was made.

By the 17th section of the Statute of Frauds (29 Car. II., ch. 3), no contract for the sale of any goods, wares, or merchandize for the price of ten pounds or upwards shall be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest or in part payment, or that some note or memorandum in writing be made and signed by the party to be charged or his agent. Unless, then, the defendant has actually received the vessel, &c., under the contract, this action cannot be maintained.

The jury have found, upon the evidence, that the defendant did actually receive the vessel and her appurtenances as the plaintiff has alleged, and it appears to me that they were warranted in so finding. The contract for the sale of the vessel was entered into at Wallaceburgh in the township of Sombra; the terms of payment and the securities to be given were all then agreed upon, and the vessel was then taken possession of by the defendant, who sent her loaded with staves to Kingston in charge of the plaintiff, to whom wages were paid for his services on that voyage as master. After her arrival at Kingston, plaintiff had her hauled up and caulked, and paid the expense of her repairs at that time. A person by the name of Black was put in charge of her by the defendant to bring her up to Toronto. the defendant and plaintiff coming up by steamboat for the purpose of completing the transfer and the securities. Instructions were given to draw out these instruments, and the drafts prepared of them were taken by the defendant to his counsel for his inspection; the vessel proceeded from Toronto under the charge of the master appointed by the defendant, intending to make her voyage back to the defendant's place at Wallaceburgh, but in consequence of a break in the Welland Canal was unable to get up during the autumn. The defendant left Toronto without assigning any reason for not awaiting the completion of the title and the giving of the securities, and after reaching his own residence writes to plaintiff requesting him to ascertain

where Captain Black and the vessel were, desiring plaintiff to receive from Captain Black some money which he had, and requesting him on receipt of it to place the amount to his credit. He further stated, that he would be unable to pay the amount of the first instalment at the time stipulated, but that in the following spring he would send down a load of staves to Garden Island, and the plaintiff should have the proceeds of the lumber and of the freight; after which he would have no difficulty in meeting the other payments as they became due. The letters of defendant contain an express recognition of the terms of sale, so far as the payment of the instalment was concerned; and if there were any doubt as to the vessel having been received by the defendant under the contract prior to her leaving Toronto on her return voyage to the westward, there cannot be a shadow of doubt that from that time at all events he accepted and actually received her and treated her as his own. This he could only have done under his contract; and had he chosen to fulfil his contract instead of repudiating it, as he is now anxious to do, he was in a position to compel the plaintiff to execute it on his part—their being, in fact, a part performance. But the fact of his using the vessel as his own in bringing down a cargo for himself immediately after the contract, and paying the plaintiff wages for navigating her, establishes, I think, a delivery to and an acceptance by the defendant quite sufficient under the Statute of Frauds.—*Chaplain v. Rogers*, 1 E. 192; *Elmore v. Stone*, 1 Taunt, 458. Upon this evidence the learned Chief Justice considered the plaintiff entitled to recover on the common counts; and if so, then the objections raised as to the variance between the proof and the contract stated in the 1st count, in reference to the payment of interest, which variance might have been amended if necessary at *Nisi Prius*, is of little moment. There was undoubtedly some evidence to support the 2nd count of the declaration, as for goods sold and delivered (the boats and other appurtenances not requiring any transfer in writing), and for work and labour to a small amount; and the charge could not be recovered under these heads for the expense of pre-

paring the conveyance and securities. The defendant contends that a transfer of the vessel could only be legal if made by bill of sale or other instrument in writing containing a recital of the certificate of ownership of the vessel, or the principal contents thereof; and that, there being no such transfer, the vessel still continues the property of plaintiff; and therefore that he can only recover the damages occasioned to him by the defendant's repudiation of the contract. Under the 13th section of 8th Vic., ch. 5, no transfer is valid or effectual for any purpose whatever unless made by bill of sale or other instrument in writing, containing, in all cases of prior registry when certificate of ownership has been given, a recital of such certificate of ownership or the principal contents thereof. It is not pretended, in this case, that there had been such a transfer as the statute contemplates for the effectual assignment of the property; but it does not rest with the defendant to set up as a defence his own breach of contract in refusing to accept such a transfer. The plaintiff has delivered his vessel to the defendant, who has converted her to his own use; and it is not very satisfactorily shewn where or in what state she now is, or that the plaintiff could now recover her even if he chose, after a lapse of two years, to take her back again. It is not the plaintiff's fault the transfer was not made, and the defendant cannot avail himself of his own wrong to avoid the payment of the purchase money of the vessel of which he has had the benefit. Though the title of a ship or vessel can only be legally transferred by bill of sale or some other instrument in writing, it does not necessarily follow that the sale of a vessel must be viewed in the same light or subject to the same incidents as the sale of lands. A vessel may be assigned by an instrument in writing; the statute does not require it to be under seal. Landed property can only be conveyed by deed or devise: to constitute a valid deed there must be a delivery, and there can be no effectual delivery unless there is an acceptance; so that a party let into possession under an agreement to purchase lands may refuse to accept of a deed: and, unless the agreement has been in writing and signed by him, he could

not be subject to an action at law for the breach of it. An agreement for the sale of a vessel—a mere chattel—is not required to be in writing; but, in order to “facilitate transfers of the same, and to prevent the fraudulent assignment of any property in such vessel,” the actual transfer must be in writing, and must refer to the certificate of ownership previously granted by the collector of customs at the port to which the vessel belongs. The transfer of vessels must be greatly facilitated by the provisions of the statute, because the owner is always provided with his proof of title to exhibit to any intending purchaser; and frauds must necessarily be prevented in the disposal of that description of property which, to be of any value, must frequently be engaged in long and distant voyages, out of the actual control of the owners.

There is a manifest reason why sales of land and sales of ships or vessels should stand on a totally different footing. In the one case the property cannot be destroyed or removed so that the owner cannot recover it; in the other the property is of a perishable nature, peculiarly liable to accidents, and removable with little difficulty beyond the owner's reach. In the latter case there seems to be no good reason for requiring an agreement of sale to be in writing, though there are very sufficient reasons for requiring actual transfers to be in writing and to be registered. The plaintiff has a right to affirm the contract entered into, under which he has given up his vessel to the defendant; and it cannot rest with the defendant, under the circumstances of this case, to say that the contract shall not be carried out.

After the repudiation of the contract by the defendant, the plaintiff might probably recover the value of his vessel in an action of trover, but he is not, in my opinion, driven to that action as his only remedy; the contract is still in force, and the plaintiff has a right to recover any damage fairly resulting from a breach of it. The breach assigned is, that the defendant would not accept of a conveyance of the vessel by bill of sale or otherwise, and damage is alleged to have thereby arisen to the plaintiff by the total loss of his vessel and the gains which he would have derived from the use of

her, and by the expense incurred in preparing for execution the bill of sale. Under this breach, the plaintiff is undoubtedly entitled to recover some damage. He has proved an injury actually sustained, and it rested with the jury to find the amount. They have found the full value of the vessel, together with interest, and the specific damage incurred in preparing the transfers; and the verdict could only be set aside for excessive damages: and, though it may be said that the loss of the vessel to the plaintiff did not necessarily result from the defendant's refusal to take a conveyance, yet I think we ought not on that account to disturb the verdict, when we see that justice is with the plaintiff, and that he would undoubtedly be entitled to recover in another form of action.

SULLIVAN, J., concurred.

Rule discharged, with costs.

GASKIN v. CALVIN & COOK.

St. Lawrence tug boats—Delays—Liability of owners therefor.

Declaration: That defendants were owners of a line of tug boats on the river St. Lawrence and St. Lawrence canals; and that they received a schooner of plaintiff's to be towed from Lachine to Kingston for reasonable reward, &c., and undertook to use due and reasonable diligence and dispatch in towing said schooner. Breach—want of diligence and unreasonable delay, &c., whereby, &c.

Pleas—1. Non-assumpserunt. 2. That they did use due diligence and dispatch, &c.

Facts—Defendants had entered into a contract with government to tow vessels on the river St. Lawrence. A public note, signed by the secretary of the Board of Works, and containing regulations for towing, &c., also signed by defendants, appeared in a public newspaper at Kingston. One of the defendants, when examined as a witness, proved the contract with the government. Plaintiff's schooner was taken in tow at Lachine by one of the line, and through the tow boat was several times delayed and detained before reaching the place of destination.

Held, that the contract with the government was sufficiently proved: that the line of tow boats having been established according to the printed notices, such notices import the basis on which future constructive or implied agreements with individual ship owners are to be rested: that the plaintiff's vessel, with a fixed and known destination, having been taken in tow by a tug of defendants, the inference must be that she was to be towed through to her place of destination with due and reasonable diligence, according to the provisions contained in the public notice; and that, without a special agreement on the subject, she should not be dropped or deserted at the pleasure of the owner of the tug.

The declaration in this case (21st April, 1852,) stated that the defendants before, &c., were owners of a line of tug boats, used by them for tugging and towing schooners,

&c., in the river St. Lawrence and the St. Lawrence canals, to wit, from Lachine to Kingston, and from Kingston to Lachine, for hire and reward; and that the plaintiff owned a schooner called "Britain," lying at Lachine, and bound thence to Kingston; and thereupon the plaintiff, to wit, on the 1st of November, 1851, at defendants' request, placed his said schooner in and subject to the defendants' control, in tug or tow of one of their said tug boats, and the defendants received the same in tow thereof, to be by them with all reasonable dispatch and diligence tugged and towed from Lachine aforesaid by the said river St. Lawrence and St. Lawrence canals to Kingston aforesaid, for reasonable reward in that behalf to be paid by the plaintiff to the defendants; and they then received the said vessel in tow for the purpose aforesaid; and in consideration of the premises, and of the reward in that behalf to be paid by plaintiff to them, *the defendants promised* the plaintiff to use due and reasonable diligence and dispatch in towing the said schooner from Lachine to Kingston aforesaid, and to proceed with and tow her to Kingston aforesaid within a reasonable time; and the plaintiff averred that although, &c., yet defendants, not regarding, &c., did not use due and reasonable diligence and dispatch in towing the plaintiff's said schooner from Lachine to Kingston aforesaid, and did not within a reasonable time proceed therewith from Lachine to Kingston aforesaid; but on the contrary, the said schooner was unnecessarily detained on the occasion aforesaid for an unreasonable time, to wit, fifteen days, more than necessary, *whereby* plaintiff lost the use of his said vessel during that time, and was put to great expense in maintaining the crew, &c.; and a portion of the cargo, to wit, 300 boxes, &c., of raisins and sugar, of the plaintiff being of a perishable nature, were by means of the premises greatly injured and lessened in value, to wit, 50*l.*, &c.

Pleas—1st. That the defendants did not, nor did either of them, *promise modo et forma*, &c., and issue.

2nd. That the defendants did use due diligence and dispatch in towing plaintiff's schooner from Lachine to Kingston, &c., and issue.

The case was tried before Mr. Justice Burns at the last

Kingston assizes. It appeared in evidence that in the newspaper called the Daily British Whig, published at Kingston, and dated the 16th of May, 1851, there appeared a public notice dated Department of Public Works, 29th March, 1851, signed by order, Thomas A. Begley, secretary: that a contract had been made by that department with Messrs. Calvin & Cook (defendants), who were thereby bound to have fully prepared and well equipped at least four steam vessels for the purpose of towing vessels during the season up and down between Kingston and Lachine from the 1st of April (or from the opening of the river) until the first of December (then) next. The vessels for towing between Dickenson's Landing and Prescott to be of at least sixty horse power, and those on the other portions of the route to be of not less than forty-five horse power; and in case of any accident occurring to any of them, their places to be immediately supplied with others equally suitable: that a tug boat would be dispatched on the downward trips from Kingston and from Cornwall every Monday, Wednesday, and Friday, and on the upward trips from Lachine and from Dickenson's Landing every Tuesday, Thursday, and Saturday, during the season. The tow of vessels taken on these days would be brought through direct, and without any unnecessary delay whatever. All vessels to be taken in their turn except lake craft, which should have the preference: that the charges for towing per mile would be according to the rates in the table annexed, with reference for information to the Department of Public Works, Toronto. Then followed a table of rates for towage per mile for each vessel upwards, varying according to their draught of water from two to nine feet, and breadth of beam from twelve to twenty-six feet, which rates should be charged according to the following distances, viz.:

| | |
|--|-----------|
| "From Lachine to lower entrance, Beauharnois canal | 19 miles. |
| "Length of Beauharnois canal | 12 " |
| "From upper entrance thereof to Cornwall | 40 " |
| "Length of Cornwall canal | 12 " |
| "From Dickenson's Landing to Prescott | 41 " |
| "From Prescott to Kingston | 67 " |

"Total 191 miles.

"Towage downwards not to exceed one-third of the above rates."

At the bottom was added—

“Vessels availing themselves of the tug line from Kingston to Prescott downward will be towed from Prescott to Kingston or upward at one-third the tariff, or same rate upwards and downwards.

(Signed,) CALVIN & COOK.”

Also a printed hand-bill headed, “Towage on the river St. Lawrence,” dated “Department of Public Works, 1st April, 1851, signed “By order. Thos. A. Begly, secretary.” It declared that in order that there might be no misunderstanding respecting the precedence which lake craft were to have over barges, &c., in all cases the tow taken on at the ends of the line were to be carried through, whether vessels or barges. If on the route a lake craft should be met with at one of the way stations waiting to be towed, no part of the tow previously taken on was to be cast off to take in such lake craft, but it should be so arranged that that lake craft should be taken on the next turn. In case of a tug taking on a full tow at Lachine—say part schooners, part barges—as they could not all be brought together from Dickenson’s Landing to Kingston, the schooners were first to be brought up to Prescott and left there while the tug went back to bring up the remainder of the tow left at Dickenson’s Landing, and then all were to be brought on together to Kingston, unless it should be desired to sail the schooners up. The hour for starting to be six o’clock A.M., when the tow would be taken on of vessels in readiness, but not to be detained waiting for others, unless those moving through the canals, or getting up to their berths. In all cases the masters of the vessels must have on hand the means wherewith to pay the towage, otherwise such vessels are not to be taken in tow without the previous consent of, or arrangement with, Messrs. Calvin & Cook.

It further appeared that the defendants had at times three, and at others four steam tug boats between Lachine and Kingston during the season of 1851: one from Lachine to Beauharnois, one from Beauharnois to Cornwall, and two from Dickenson’s Landing to Kingston: that the steamer *Chieftain* had towed between Lachine and Cornwall, but in the end of October had broken her shaft, and it took

thirteen days to repair it, and that this accident deranged the line : that the plaintiff's vessel, called the *Britain*, a schooner, left Halifax, Nova Scotia, with a cargo of sugar and raisins belonging to the plaintiffs on the 14th of October, arrived at Quebec on the 27th or 28th of October, and reached Montreal on Saturday the 1st of November : that while at Quebec the plaintiff spoke to the agent of the defendants there, and to the captain of the steamer *Traveller*, which was a tow-boat of the defendants, and then at that port, but no bargain was made. On reaching Montreal the master of the plaintiff's vessel applied to the defendants' agent there, who informed him of the accident to the *Chief-tain*, and said there was no boat to tow : that the plaintiff's vessel was on the same day taken to Lachine : that the schooner *Sophia* was already there and entitled to precedence, but there was no tow-boat there : that two other schooners, named *Shickluna* and *Sophia*, came up after the plaintiff's. All but the plaintiffs agreed to be towed by a steamer not the defendants' to the Beauharnois canal, but one had grounded at the mouth of the Lachine canal : the other two schooners went on. That on Monday the 3rd, the defendants' tug-steamer *Charlevoix* arrived down, and the plaintiff's master immediately applied to him to be towed up. He said the wind was too high, and when it moderated he would take both vessels, and he refused to tow plaintiff's singly, though requested by the master : that they remained at Lachine till the 6th of November, although one at a time might have been easily towed up the 3rd or 4th : that on the 6th the *Charlevoix* towed the plaintiff's vessel and the *Shickluna*, that had been grounded, to the canal, where the others were overtaken, and that she also towed them from thence to Cornwall, where they arrived on the 7th of November, and the tug-boat returned to Lachine. The plaintiff's vessel was then worked through the Cornwall canal to Dickenson's Landing, but no tow-boat met her there : that the defendants' tow-boat, the steamer *William the Fourth*, arrived there the next day. At that time the other schooners, the *Sophia* and the *Shickluna*, were ahead of the plaintiff's, but the plaintiff's master told the master of the steamer

that he was entitled to preference ; but he said he must take the first vessels, and took the other two, leaving the plaintiff's behind : that while there the *Charlevoix* came up with two vessels in tow and took them to Kingston : that on the 11th of November (being the end of the fourth day) the *William the Fourth* came and towed the plaintiff's vessel to Prescott, and left her there—the steamer returning to the Landing to tow a dredge belonging to government : that on the next day the plaintiff's vessel set sail up the river, but got on the rocks and was detained nearly two days, when she was got off, after which the *William the Fourth* came and towed her to Kingston. In the meantime the *Sophia* had been up to the head of the lake and returned with a cargo to Kingston : that the usual time between Lachine and Kingston was four days not travelling by night, or two days of twenty-four hours : that the steamers did not, but horses did, tow vessels through the canals : that it was customary for the defendants to keep accounts with the plaintiff for towage—there being accounts between them, and the defendants were in plaintiff's debt on account of staves ; but the master of the plaintiff's vessel paid the master of the *William the Fourth* 7*l.* 10*s.* for so towing her, being requested of him by the master, who said he was in want of money : no money was demanded by the master of the *Charlevoix*. There was much other evidence given to shew the want of tow-boats, the delay of the plaintiff's vessel, and the alleged negligence ; also to shew the injury which the cargo had sustained thereby, being perishable, and the plaintiff's loss upon the sale thereof.

A nonsuit was moved on the grounds—

1st. That the contract with the government referred to in the printed notice ought to have been, but was not produced and proved.

2ndly. That no contract with the plaintiff was proved : that if the published notice proved anything it was an obligation to the government, and not to the public or to the plaintiff on the defendants' part ; and that no specific contract was proved.

3rdly. That if any contract was proved, it was not such as was declared on—*i. e.*, to tow from Lachine to Kingston—

the proof being that the vessel was towed from Lachine to the Beauharnois canal, thence to Cornwall, thence from Dickenson's Landing to Prescott, and thence to Kingston at separate periods, and defendants had nothing to do with towing her through the canals: that, if anything, there was a series of separate contracts, and not one to tow continuously, as alleged: that the towage from the Landing to Prescott was a distinct bargain, and paid for accordingly: that there had been no detention after the bargains were made and the vessel taken on; and that defendants had nothing to do with her after she reached Prescott—that is, as obligatory upon them as respected towing her further: that, if any, separate contracts only appear, and so there is a variance.

The case, however, proceeded with leave to move.

On the defence one of the defendants was examined as a witness, and admitted that they had three vessels in the tow line last autumn, but their understanding with government was, that they were to have two on one part if one could not do the business—were bound to have four if necessary: had three, and kept one in reserve. He in effect admitted the arrangement with government as imported by the printed notices. Evidence was also given to excuse delays and disappointment owing to the accident to the *Chieftain*; and to rebut the inference of negligence, all proper to the jury on the second issue, and the question of damages; but it did not materially affect the evidence as the plaintiff relied on sustaining by implication an agreement to tow such as the declaration set forth.

The learned judge, assuming that there was evidence for the jury, left it to them to determine.

1st. Whether it satisfied them that the defendant did undertake to tow the plaintiff's vessel from Lachine to Kingston as alleged, although, (if found) to be implied in the absence of direct proof, and the separate transactions rendering it questionable.

2ndly. Whether under all circumstances, the defendants had used due diligence, if bound to tow.

The jury found for the plaintiff with 137*l.* 10*s.* damages.

In the following term a rule was granted calling upon the plaintiff to shew cause why the verdict should not be set

aside and a nonsuit entered, or a new trial be had without costs, or with costs to abide the event, on the grounds—that such verdict was contrary to law and evidence, to the weight of evidence, and to the judge's charge, and on affidavits filed. The only affidavit filed was that of the defendant, who was examined at the trial, stating that one Collins, master of the *Charlevoix*, could, he was informed and believed, prove that no preference was given to vessels requiring to be towed, the defendant being under the impression that it was owing to a preference being given at Dickenson's Landing that the jury found for the plaintiff: that he was also informed and believed he could disprove negligence or want of care by the said Collins, who is a material witness for the defendants, and whose attendance he endeavoured to procure at the last trial without success—the said Collins having gone to reside at French Creek, and being without the jurisdiction of this court; but that he hoped to procure his attendance at another trial, if granted.

Vankoughnet, Q. C., shewed cause last term, and contended—1st. That the arrangement existing between the defendants and government did not render the government charterers of the steam tugs, but merely amounted to the giving a bonus on the one hand in consideration of the defendants on the other establishing a line of tugs to tow all vessels as they came, at specified rates. But that in each particular transaction the contract to tow, the risk, duty, obligation, and right to the towage, rested between the owners of vessels and the defendants.—*Cuthbertson v. Parsons*, Law Times, 7 August, 1852, p. 297; *Hobbit v. The London and North Western Railway Company*, in C. P., 4 Ex. R. 254; *Eaton v. Bell*, 5 B. & A. 34.

2ndly. That a contract between the plaintiff and the defendants was sufficiently proved through the medium of the published notices and the other evidence: that the printed notices imported that vessels bound from Lachine to Kingston were to be towed through from one to the other, and that whenever a vessel was taken in tow at Lachine so bound, she became entitled to her place all through; and the inference arising from her being taken in tow was, that she was to be conveyed regularly through: that there

could be no other intendment in the absence of any special agreement to be towed only from one point to another : that the implication was an undertaking to tow from Lachine to Kingston, wherever steam tugs were required to tow, along the line of navigation, excluding canals if not intended to be included.

3rdly. That if a contract, defendants had clearly broken it : they were negligent, and were liable to the damages.

Richards, in reply, submitted that there was no evidence of the contract : that in the first place the printed papers proved nothing : that, if to be made a basis, the contract with government should be shewn distinctly : and that as it was it did not appear, nor could the Court tell whether the defendants' contract with government was merely to establish and maintain a line of steam tugs, or to tow at the rates agreed upon, or to tow for the account and benefit of the government at those rates, wherefore the substratum was wanting, and the proof failed. Secondly—That if the arrangement with government could be regarded as only of the former kind, then nothing can be inferred therefrom as between the defendants and the plaintiff for want of privity ; and that no actual agreement to tow being shewn, it was left to inference—the only inference was, that the defendants had engaged to tow only according to the line of each tug that took plaintiff's vessel in tow : that a single continuous agreement could not be inferred, nor anything more than several distinct undertakings, wherefore there was a fatal variance : that the declaration should at all events have stated an agreement to tow from canal to canal, and not from Lachine to Kingston continuously, of which there was no evidence to warrant the inference : that there was no evidence of a promise to tow with diligent or due dispatch, the only proof being the towing actually performed and the inferences which it warranted : that nothing was proved to have been substantively agreed to be done, only what was done, and no such inference could be drawn therefrom as that contended for by the plaintiff : that there was no evidence of negligence, and evidence was received quite inadmissible—evidence that might have been well enough in an action on the case for not having provided

tug-boats with due diligence, but inapplicable in this action—merely the delay complained of at Lachine before the plaintiff's vessel was taken in tow at all: that, however, it might be a breach of duty, or of the contract with government, it would be no violation of an implied agreement to tow not then made. He asked, were the case reversed, could the defendants on such evidence have sued the plaintiff for not permitting them to tow from Lachine to Kingston, as he argued they should when the action could be sustained by the proof given in this case, and urged that in no point of view could the contract alleged be made out; that inadmissible evidence calculated to enhance the damages was admitted, and that all the defendants' delays were satisfactorily and reasonably accounted for, and the inference of negligence repelled, as he argued from tracing the plaintiff's vessel from Lachine to Kingston, and commenting on the various circumstances that interposed to cause her delay.—*Chit. Junr. Forms*, 102, notes; *Tucker v. Crachlin*, 2 *Star.* 385.

MACAULAY, C. J., delivered the judgment of the Court.

1st. As to the necessity of the plaintiff's proving the defendants' contract with government otherwise than through the printed notices, the question is not now before us upon the plaintiff's evidence exclusively, but upon the whole evidence; and Mr. Calvin, one of the defendants, being examined on his own behalf on the defence, admitted all that it could be material for the plaintiff to have proved in addition to what he had done. I do not therefore think this objection any longer tenable.

2ndly. Then, as to the nature of the contract subsisting between the government and the defendants as respected its effect upon the alleged contract with the plaintiff, I think it must be taken that the contract with government was such as the printed notices import, and that the defendants were cognizant of, and assenting to the contents of such publications; the principal one (the first in point of date,) concludes with a supplementary notice from the defendants, and although the original signed by them was not produced or found, there seems no reason for any doubt

of its having emanated from them ; but upon the whole evidence, I think that as a fact, the jury were warranted in drawing the inference that the printed notices were promulgated with the defendants' concurrence and assent.

3rdly. I think the contract with the government did not amount to a chartering by the government of the defendants' steamboats sufficient in number to establish and maintain a line of tug-boats, or that under it the defendants were to tow for account and benefit of the government, but that it only bound the defendants (as between them and the government) to establish and maintain such a line of tugs for the public accommodation ; but the tugs being at the defendants' expense and risk, and the towing at the rates agreed upon to be done on account and for the emolument of the defendants.

4thly. That under the government arrangement the defendants did establish a line of tugs, and held out to the public that they were bound and ready to tow all vessels in due order at the rates specified.

5thly. That such line having been established, was in operation when the plaintiff's vessel reached Lachine.

6thly. That, as the nature of the contract with the plaintiff, no express agreement was made on the subject of towing his vessel, and that therefore it can only be implied from the facts in evidence. In other words, that, according to the new rules, the promise traversed is to be implied from the matters of fact alleged and proved.

7thly. The line of tugs having been established according to the printed notices, such notices import the basis on which future construction or implied agreements with individual ship owners are to be rested. Taking it, then, that the existence of a line of tug-boats owned by the defendants as stated by way of inducement in the declaration, either is not denied or put in issue by the plea of *non-assumpsit* under the new rules (Tyrwhit Pl. 269, or, if traversed, was proved as a fact at the trial ; and regarding such line as established under the agreement with government, the question in the abstract would be, what is the

implied contract arising upon the fact of one of the defendants' steam-tugs taking in tow a schooner at Lachine bound for Kingston, and what would thereupon become the incumbent duty of the defendants in that behalf? In the first place, in the absence of anything special, I think the intendment or inference must be that she was taken in tow to be towed through with due and reasonable diligence, according to the provisions contained in the public notices, and to retain her proper place as a tow until she reached Kingston; and that, in the absence of anything special to affect the question, the construction of the agreement under such notices would be, that she was to be towed as alleged in the declaration with reasonable dispatch from Lachine by the river St. Lawrence and St. Lawrence canals to Kingston, for reasonable reward, &c. It is, however, contended that no such agreement can be implied in this case.

It, however, seems the only inference that could be drawn from the public notices, which intimated that the defendants (not the government) were bound to have four steam vessels for towing up and down between Kingston and Lachine—such tugs to leave Kingston and Cornwall on the downward trip every Monday, Wednesday, and Friday, and to leave Lachine and Dickenson's Landing every Tuesday, Thursday, and Saturday: the steamers towing between the Landing and Kingston being of greater power than those on the other portions of the route: that the tow of vessels taken on those days would be brought through direct without any unnecessary delay; and that all vessels would be taken in their turn, &c. The second notice of the 1st of April, 1851, repeats this, stating that in all cases the tow taken on at the end of the line was to be carried through: that the charges for towing per mile would be according to the rates in the table given, which table included the Beauharnois and Cornwall canals, and specified the length of each. It may be said that the subdivisions contained in this table indicate that towing for portions only of the distance was contemplated and provided for; but if so, it would form a matter of special agreement or exception, in the absence of

which, when a tow was taken on at Lachine, the owner of the schooner on the one hand would be entitled to have her towed through, and the owner of the tug, on the other, would be entitled to tow her through, with its advantages and obligations. Besides, towing of vessels and barges from station to station on the route or way of vessels, was evidently anticipated in the terms of the notices. I think, therefore, that inferring the contract from the printed notices, the establishment of the line, and the fact of a tow being taken on at the end of the line, the declaration is correctly framed and adapted to such a contract as would be implied therefrom. But then it is said that in fact the defendants did not tow through the canals, and that no contract to do so could be implied from their course of business; and that therefore there is a variance in the statement of the contract, as resulting or inferred from the evidence, in alleging an undertaking to tow continuously. The answer seems to be, that the canals are not excepted but included in the notices, and that the contract to tow a vessel taken on at Lachine, when to be implied must be determined in reference to the public notices as the basis, or as forming a part, or as expressing the terms of such contract; and if so, the agreement ostensibly would be mutually to tow and be towed through from one termination to the other, however, a strict compliance might be waived on the way, or the tow be dragged or warped through the canals by horses or otherwise, instead of the tug-boats. How the fact was, does not appear, but I should suppose the charges to the owners of vessels in tow of the defendants' tugs for towage along the line of the canal (independent of lockage), when towed otherwise than by such tugs, did not exceed the rate per mile specified in the published table of rates. Another answer seems to be, that in fact there was no uniform or invariable rule or system. The government notices embrace all the distance in terms, except that in making the appointed times and places for starting, the Cornwall canal is not mentioned as embraced; but that does not shew that tows up or down were not to be taken through it; and according to the evidence, the plaintiff's vessel was towed by the

same tug from Lachine to Cornwall; whether she was so towed through the Beauharnois canal or not, not appearing. And it is in evidence that the same tug having returned, from Cornwall to Lachine, towed two vessels on her next trip through to Kingston, passing the plaintiff's vessel on the way, and leaving her behind. Moreover if the canals should be omitted, still a reasonable construction must be given to the agreement as laid; and it is susceptible of the construction that the defendants promised to tow through by or *viâ* (not by and through) the river St. Lawrence and St. Lawrence canals in the usual way, or wherever towage was usual according to the known course of the defendants' line. The objection to it is, that if upon the contract as stated, the breach assigned or the evidence to prove the breach were as laid, there had been a refusal or neglect to to tow through the Cornwall or Beauharnois canal. I do not see that such would not be a good breach, or sufficient evidence of the breach of the contract as laid, or to be implied from the notices and the taking in tow. However, as I have come to the conclusion that on the evidence such is the contract to be implied in this case, the distinction ceases to be important; and the evidences in support of the breaches alleged does not relate to any such neglect or refusal as the gravamen of the action. I cannot profess to be familiar with the rules of towage, but my impression certainly is that whenever a vessel with a fixed and known destination is taken on by a tug, that the owner of the tug impliedly undertakes by that overt act, and is bound to carry her through, and is not at liberty to drop or desert the tow whenever he pleases, unless under special stipulations upon that subject.

The objection of variance is beside the merits; if valid, an amendment at *Nisi Prius* might have been made to cure it; and upon careful consideration I do not think it tenable; or I think there was evidence of an undertaking to tow with all reasonable dispatch and diligence, and that the second plea is not sustained in that respect. The evidence shews that the defendants' tugs did not proceed diligently through with the plaintiff's vessel, but neglected her,

especially at Dickenson's Landing, in a way constituting sufficient evidence of a breach of the defendants' promise and duty in that behalf. It is not contended that the damages are excessive, but it is urged that the delay in taking the vessel in tow at Lachine was proved, dwelt upon, and went to the jury, and may have materially enhanced the damages, though inadmissible in this action for breach of a contract to tow, which agreement did not arise or exist till the vessel was actually taken in tow; and this although the plaintiff might have had an action on the case against the defendants as for a tort in not taking his vessel in tow at an earlier period.

It is by no means clear to me that this ground of objection is embraced in the rule. It does not complain of the improper admissibility of evidence. The grounds for a new trial are, that the verdict is contrary to law and evidence, the weight of evidence, and the judge's charge, and upon affidavits filed. Of course the reception of this evidence affords no ground for that part of the rule which seeks to nonsuit the plaintiff. It did not render the verdict contrary to law or evidence, for to a less extent in point of amount it would leave it undisturbed. But, assuming it to be included, I do not think it a sufficient ground for setting aside the verdict. Excess of damages is not urged, and the evidence would have well warranted the amount quite irrespective of this part of the case. The defendants' affidavit does not attribute the verdict thereto; and if the plaintiff could have recovered therefor in another form of action, it is a reason why, if he is otherwise entitled to prevail in this, that he should be allowed to sustain the verdict herein without being driven to a second suit.—*Israel v. Douglas*, 1 H. B. 241; *Mayfield v. Wadsley*, 3 B. & C. 357, 5 D. & R. 224, 3 B & C. 362, Per Abbott, C. J.

Lastly—I do not think the defendants' affidavit (the only one filed) contains sufficient matter to warrant us in disturbing the verdict. He did not attempt to postpone the trial on account of Collins's absence: he took his chance of a verdict without him. The witness, though in a foreign country, was not far off. We have nothing from himself

as to, what he could prove, nor does the defendant allege that he knows he can prove what is suggested. He merely expresses what he is informed and believes he could prove. This I do not think sufficient in the face of the strong case which the plaintiff's evidence presents in favour of the verdict.—*Turquand v. Dawson*, 1 C. M. & R. 708; *Christie v. Wildman*, 8 Taunt. 236; 2 Mod. 179, S. C., much in point; *Edwards v. Digman*, 2 Dow. 642. Upon the whole, therefore, I think the rule should be discharged.

Rule discharged.

BOWEN ET AL. V. EWART ET AL.

Collision between steamers.

In cases of collision between vessels, a defendant is not liable unless the whole fault can be attributed to his vessel.

Held in this case, that it does not satisfactorily appear that all or any of the blame can be justly attributed to the defendants' vessel. A verdict therefore found for the plaintiffs at *Nisi Prius* was set aside, and a new trial granted.

This was an action by the plaintiffs, whose vessel was sunken from a collision between their vessel and that of the defendants.

Without going minutely into the evidence, it appeared that on the night of the 7th of November, 1851, between the hours of six and seven p.m. the plaintiff's royal mail steam vessel called the *St. Lawrence*, and drawing about from three to four feet of water, was descending the channel on the north side of the lake St. Francis, steering from the Island light to the light at McGee's Point: that the defendants' freight steam vessel called the *Britannia*, and drawing about eight and a half feet of water, was ascending the lake in the same channel, and steering from McGee's Point and light towards the Island light; that between these two lights the said vessels came in collision nearly opposite a point called Point Mouillet, on the north side of the said lake: that the plaintiffs' vessel was struck by the steamer of the defendants, a few feet from the stem or bow on the starboard side, and so badly injured that she sank almost immediately in eleven or twelve feet of water: that at the time of the collision the plaintiffs' vessel had her

helm to starboard, or was nearly still, the engine having been reversed : that the helm of the defendants' vessel was to larboard, and the vessels were in that position : that the plaintiffs' vessel was struck on the starboard side forward of the wheel house, and that the larboard bow of the defendants' was rubbed or marked.

The pilots of both vessels saw the approach of each other by their lights in ample time ; and witnesses of the plaintiffs' represented that their vessel's helm had been ported repeatedly as the vessels neared each other, and until she was so far to the south (her proper side of the channel) as to be in danger of grounding upon a shoal well known to be in that part of the lake.

That her engine had been stopped and reversed was clear, but whether her helm was to starboard at the time of the collision was not very clear. Her relative position was shewn by the point of contact of the two vessels. The proximity of the alleged shoal was assigned as a reason for her having at last tried to pass to her left side ; and it was alleged that the defendants' vessel was out of her proper course, or too far south in the channel. The helm of the defendants' vessel was ported when the danger of collision menaced, and she was swinging to starboard when she struck the plaintiffs' vessel. The existence or proximity of the shoal was denied by witnesses for the defence. The evidence to establish such shoal represented the shallowest part to be about four and a half feet, but however that was, or how gradually the water shoaled from where the plaintiffs' vessel was struck or sunk was not clearly explained. This much is clear, the defendants' vessel at the crisis conformed to the rule of navigation in porting her helm, the plaintiffs' did not. The defendants' vessel drew eight and a half feet of water and yet did not ground, though alleged to be outside or south of the plaintiffs', that is, nearer the shoal. The plaintiffs' vessel might have floated in much less water than the defendants', and the depth on the shallowest part of the shoal equalled or exceeded her draught of water.

Stress was laid by the plaintiffs' counsel upon the defen-

dants' vessel having taken the south side instead of the north of the alleged channel, and contended that the best was done that could be done by the plaintiffs' vessel in the exigency occasioned by such deviation.

The jury found for the plaintiffs, 1603*l.* damages.

In Easter term last a rule was granted calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a new trial be had between the parties on the ground that the verdict was contrary to law and evidence, and on the ground of surprise, and on affidavits filed.

Cameron, Q.C., shewed cause last term.

Hagarty, Q.C., supported the rule.

The following references were made in the course of the argument: *The General Steam Navigation Co. v. Tonkins*, 4 Moore P. C. 314; *The Ripon*, 6 Eccl. & Martine, 245; *The Iron Duke*, 9 Jur. 476; *The Europa*, 14 Jur. 627; *The Anne & Mary*, 7 Jur. 999; *The Nimrod*, 15 Jur. 1201, 9 Vol. Am. English Reports, 560.

MACAULAY, C. J.—In cases of this kind a defendant is not liable unless the whole fault can be attributed to his vessel, if the provincial statute 7 Wm. IV. ch. 22, sec. 8, does not create a different rule, and the plaintiff be entitled to the benefit thereof. Section 4 of that act enacts that all vessels navigating the lakes and rivers of Upper Canada and the British *channel* of the St. Lawrence river between Kingston and the eastern boundary of the said province, shall take the starboard or right-hand side of every channel in proceeding up or down the said lakes, rivers, or *channel*, or any of them, so as to enable all vessels meeting each other to pass in safety. Section 8: that the owners of all steamboats, schooners, and other vessels, the persons commanding or in charge of which shall neglect to comply with the provisions of that act, shall be liable for all damages to be sustained by any person or persons from any accident arising from the non-compliance with, or during such time as the provisions of that act shall not be complied with: such damages to be recoverable by trial at law before her Majesty's Court of Queen's Bench in this province.

If the act is intended merely to determine on which side

of any channel vessels shall steer to allow ample room for passing in safety, and not to prescribe a rule of navigation that vessels meeting stem on, as it were, should port their helms, then that rule must be adopted from the decisions in England, and not drawn from the statute.

Referring to the English decisions, the rule will be found to be the same, viz.: that steam vessels, which may be regarded by analogy to sail vessels as always going free or before the wind, shall pass each other to the right when meeting nearly in the same line (a).

If the statute renders the owners of vessels out of their course in the channel liable to all damages arising therefrom irrespective of the observance by the suffering vessel of the rule of navigation in porting her helm (unless the injury is attributable to culpable neglect or mismanagement on the part of those in charge of the vessel sustaining the damage), the case was not left to the jury with a view to such a construction. It was not left to the jury to say whether the defendants' steamer was out of her proper course in the channel when she met the plaintiffs'; and if she was, whether the collision took place without wilful or gross neglect or mismanagement by those navigating the plaintiffs' steamer. It was submitted to them, in reference to the application of the understood rule (irrespective of mere deviation as to the right or left of the channel), that each should have ported helm and gone to the right of the other, and whether the plaintiffs had failed therein.

The case of *The Nimrod* in which the Imperial statutes 9 & 10 Vic. ch. 100, sec. 9, and 14 & 15 Vic. ch. 79, secs. 13 & 27, are commented upon by Dr. Lushington, is material and applicable to the meaning and effect of our statute, 7 Wm. IV. ch. 22, sec. 8; and see also Provincial statute 14 & 15 Vic. ch. 126, sch. "A." No. 6, as to vessel in direct approach toward each other.

Without expressing any opinion upon the true construction of the statute, but deferring it for further argument, should it become necessary to be considered in the ulterior stages of

(a) 2 Chit, Prac. of Law, 515; *The Shannon*. 2 Hagg. Admr. R. 173; *Woodropsins*, 2 Dod, Admr. R. 83; *The Nimrod*, cited in the argument.

this case, I shall only at present say that we are not satisfied that all or any of the blame can be justly attributed to the defendants' steam vessel, that is, upon the principle on which the case was left to the jury; and therefore avoiding any critical examination of the evidence, or any expression of opinion upon the merits, we think that a new trial should be granted, and the case be submitted to another jury (a).

Rule absolute, on payment of costs.

(a) *Vide Handayside et al. v. Wilson et al.* 3 C. & P. 528; *The John Brotherick*, 8 Jur. 276; *Everts v. Smythe et al.* 3. U. C. 192.

A DIGEST

OF

ALL REPORTED CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

FROM TRINITY TERM, 15 VICTORIA,
TO TRINITY TERM, 16 VICTORIA.

ABANDONING ORDER.

See RECORD (NISI PRIUS), 3.

ACCORD AND SATISFACTION.

See COMPOSITION.

ADMISSIONS.

14 & 15 Vic. ch. 66.—*To cause of action, and not to amount of damages]*

—In an action of assumpsit on the common counts the defendant was duly notified to attend the trial of the cause in behalf of the plaintiff, which he neglected to do; the plaintiff proceeded with the trial of the cause expecting to prove by the defendant's attorney that under the defendant's authority he had offered 20*l.* to compromise the action which he failed to prove. A verdict was taken for the plaintiff under the statute 14 & 15 Vic. ch 66, *pro confesso*, and damages were assessed at 1*s.* Held, on an application to increase the verdict to 50*l.*, the amount claimed by the plaintiff in his particulars, that the admission is only to be taken as to the cause

of action and not the amount of damages, and that a misunderstanding having arisen as to the offer of 20*l.* the plaintiff was entitled to a new trial on the ground of surprise, on payment of costs. *Robertson v. Ross.* 193.

Fact alleged not traversed does not dispense with proof.]—2. Where a material fact alleged in pleading is not traversed by the subsequent pleading, it is not therefore admitted as a fact so as to dispense with proof of it before the jury. To a plaintiff in dower the defendant pleaded, secondly, that the husband of the demandant, by an indenture to which she was a party, conveyed the lands in question to one A. B., and that demandant on &c., appeared before C. D., one of the judges of her Majesty's Court of Queen's Bench who examined her, and that she barred her dower in the said land, and that the said judge certified on the back of the said indenture. The demandant replied that she ought not to be barred from recovering her dower in the premises in the second plea mentioned, because, she says, she

did not give and acknowledge her consent to be barred of her said dower in manner and form as by the said tenant alleged. *Per Cur.*—That on these pleadings it could not be held, from the state of the record that the demandant had given her consent before a judge to be barred of her dower according to law. *Huffman v. Askin*, 423.

ADVERSE POSSESSION.

See LANDLORD AND TENANT, 1.—LIMITATIONS (STATUTE OF.)

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See ASSUMPSIT, 1.—CARRIERS. — LANDLORD AND TENANT, 2.—PLEADING, 7, 8.—VENDOR AND PURCHASER.

Agreement to manufacture wheat into flour.—The plaintiff having purchased a quantity of wheat entered into an agreement with the defendant that, on condition of the plaintiff delivering to the defendant wheat of the same quality as the sample previously shewn to defendant to be ground into flour, the defendant agreed to manufacture the said wheat into flour, and for every four bushels and forty pounds of wheat, of the quality and according to the sample received, he would deliver one barrel of flour which should pass inspection as superfine at Montreal. *Held*, that the contract was not a contract for the sale of the wheat but an agreement to manufacture for the plaintiff the identical wheat delivered, into flour: that it was a condition precedent, on the plaintiff's part, that the wheat delivered should be of the same quality as the sample: that an acceptance of the wheat by the defendant, and his manufacturing it into flour, did not cause the rules prevailing between

vendor and vendee to apply with equal force in this case as in the case of an absolute sale, to conclude the defendant from afterwards disputing the correspondence of the wheat delivered with the sample. *Stephenson v. Ranney*, 196.

AMENDMENT.

See RECORD (NISI PRIUS), 2, 3.

ASSIGNMENT OF GOODS.

See COMPOSITION.

ASSUMPSIT.

See EVIDENCE—MARRIAGE (BREACH OF PROMISE)—MONEY HAD AND RECEIVED—PLEADING, 8.

Special agreement annulled—Quantum meruit.—1. A., under a special agreement dated the 7th of July 1851, contracted with B, to finish a house and barn on or before the 10th of August then next under a penalty of 5*l.* a day after that day, &c. A. did about two thirds of the work, but did not finish it by the 10th of August or at any time afterwards. B. after default, took possession of the buildings, did work on them towards their completion, and paid a large portion of the price. *Held*, that the special agreement was annulled by the default of A. and the possession taken by, and the subsequent conduct of B.; and that there was an implied promise from B. to A. to pay what the work was worth, *Hamilton v. Raymond*, 392.

Damages.—2. In an action against the vendee, upon a contract to accept a deed of conveyance of a vessel and to give a mortgage security upon it for the purchase money, the declaration, which shewed a delivery of the vessel by the plaintiff to the defendant under the contract, alleged as a breach *the refusal of the defendant to accept such deed*; and averred that by means thereof the

vessel and its price had been lost to the plaintiff. At the trial the jury assessed plaintiff's damages at the whole value of the vessel, and the court refused to disturb the verdict. *Phillips v. Merritt*, 513.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PLEADING 11.

Bill—Liability of joint acceptors.] A joint acceptor of a bill of exchange cannot be heard to say (as between himself and the plaintiff) that he was surety for the other acceptor, and is on that account discharged by time (without his assent) having been given to his principal. *Nafis et al v. Soules et al.* 412.

BONDS.

See COMMON SCHOOLS, 2.

BY-LAWS.

See MUNICIPAL COUNCIL ACTS, 2, 6, 7, 8, 9, 10, 11.

CARRIERS.

See PLEADING, 10.

Qualification of agreement.]—Declaration—Special assumpsit upon an alleged special contract to carry safely for hire certain goods of the plaintiffs, the dangers of the navigation excepted, and for breach assigned damage to the goods through the negligence of the defendant and his servants, and not by reason of the dangers of navigation. *Plea*—Non-assumpsit. On the defence the defendant proved that although he undertook to carry for hire he so undertook at the plaintiff's risk; and the evidence having been left to the jury, they found on this point for defendant. *Held*, that the qualification as proved went to the foundation of the agreement and the lia-

bility consequent thereupon, and exempted the defendant from any damage or liability in respect of the contract. *Stevenson et al v. Gildersleeve*, 495.

CASE (ACTION ON THE).

See MALICIOUS PROSECUTION.—

SLANDER.

Action under 10 & 11 Vic. ch. 6, by an administratrix—Duty to repair walls—Evidence.]—In an action on the case under the provincial statute 10 & 11 Vic. ch. 6, brought by an administratrix for negligently causing the death of the plaintiff's intestate. the declaration stated that at the times, when, &c., the defendant was possessed of a close, and one T. A. was possessed of another close, adjoining the defendant's: that upon defendant's close a wall was standing, which before and at the times when, &c., was, to the knowledge of the defendant, in a dilapidated and dangerous state, and leaning towards the close of T. A.; by reason whereof it became the duty of the defendant to take reasonable precautions to prevent the wall from falling; but that, well knowing the premises he wrongfully permitted the wall to remain in that state and that afterwards by reason of such neglect, and while, &c., the said wall fell upon the close of T. A., and in falling killed the intestate, who was then lawfully in the close of T. V. The defendant pleaded "not guilty." Upon the trial the jury found a verdict for the plaintiff, and the court discharged a rule nisi for a new trial—holding that the declaration disclosed a legal liability in the defendant, and that the evidence (which is set out in the report) warranted the conclusion to which the jury had come.

Semble, that under this issue, the defendant was at liberty to shew that the accident was caused, either

wholly or in part, by the negligence of the intestate, or of others, for whom the defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence: and that, supposing the state of the wall as alleged in the declaration, to be admitted in the pleadings, yet the defendant might, nevertheless, in evidence shew its actual condition and bearing upon the question of negligence. *Kinney, Administratrix, v. Morley*, 226.

CERTIFICATES.

Under 43 Eliz. ch. 6, sec. 9.]—See “Costs.”

Of discharge of mortgages.]—2. See “Mortgage.”

CHATTELS.

Under what circumstances the property of chattels vests in the vendee by the contract of sale.]—1. See “Vendor and Purchaser.”

Assignments good though by parol.]—2 See “Composition,”

Machinery of a saw mill not trade fixtures]—3. See “Fixtures.”

COMMISSION TO EXAMINE WITNESSES.

Commission not returned as ordered.]—An objection taken at Nisi Prius to the admission of evidence taken under a commission, on the ground that the commission was not returned to the office of the deputy clerk of the crown, pursuant to the judge's order, was held bad. *Stevenson v. Rae*, 406.

COMMON SCHOOLS.

Levy on rates on non-residents only, illegal.]—1. See “Municipal Council Acts,” 10.

Payment of moneys collected—Bond.]—2. The plaintiff sued on a bond made by defendant to recover moneys collected by Styles under a by-law of the District of Huron Municipal Council passed to collect the sum of 25*l*, within school section No. 8, to build a school house therein: the condition of the bond being that the defendant Styles was bound to collect all the taxes due to the treasurer of the Huron District from the township of Blanshard for the year 1849, and pay over the same to the plaintiff, as treasurer, &c. *Held*, that all moneys collected for the erection of school houses under any by-law of the District Municipal Council were payable not to the superintendent but to the district treasurer, who alone under the late act, was authorized to take security from collectors for the payment of moneys collected for public purposes; and that the plaintiff was entitled to recover on the bond. *Brown v. Styles et al.* 346.

COMPOSITION.

Parol assignment of goods—Accord and satisfaction.]—The defendants admit the plaintiffs demand, but set up as a bar to the further continuance of the action an agreement which they allege was entered in o between them and their creditors, the plaintiffs being one by which the creditors agreed to take certain property and contracts in which the defendants were interested, which were to be managed by assignees appointed by the creditors: that they were ready and willing to make such assignment, but that at the time of pleading sufficient time had not been allowed to complete the same. The plaintiff, taking this plea as good, replies, that he and the other creditors did not mutually agree with each other and with the defendants to take the assignment, &c., therein mentioned, as a com-

position for, or a satisfaction of their respective debts, nor was it agreed between them that the plaintiff was not to proceed against the defendants for the recovery of his said debt. *Held*, per SULLIVAN, J., that a composition, where lands are not concerned, or an assignment of goods which would not fall within the Statute of Frauds, is valid by parol: that it is no objection to the accord set up in this case that the satisfaction had not been given at the time of the plea pleaded: that an agreement as an accord, to which all the creditors are parties, it is good, if there be no other fatal objections, notwithstanding that acceptance is not shewn, there being no default on the part of the debtors: that the plea after verdict must be held good because it is in the nature of the circumstances that the mutual promises were (provisionally) a satisfaction for the debt. *Brunksill v. Metcalf et al.* 431.

CONSIGNOR AND CONSIGNEE.

See PLEADING, 10.—PRINCIPAL AND AGENT, 2.

CONTRACT.

See AGREEMENT.—ASSUMPSIT 1.—MARRIAGE (BREACH OF PROMISE), PLEADING, 7, 8.—ST. LAWRENCE TUG BOATS—VENDOR AND PURCHASER.

CORPORATIONS.

See MUNICIPAL COUNCIL ACTS.—PLEADING, 9.

COSTS.

See MUNICIPAL COUNCIL ACTS, 10, 11.

Certificate depriving plaintiff of full costs—22 & 23 Car. 11. ch. 9—

43 Eliz. ch. 6.]—To a declaration in trespass the defendant pleaded not possessed, which was held bad on demurrer, and the plaintiff obtained a verdict, with 1s. damages, A certificate, under the statute 43 Eliz. ch. 6, sec. 9, was obtained by defendant after judgment entered and costs taxed, that damages were under 40s. On motion for revision of taxation of costs; *Held*, that the plaintiff was entitled to costs on the ground that the judge who tried the cause could have had no opportunity of certifying that the title was in question under the plea of not possessed, after its being held bad on demurrer; and that the certificate under the stat, 43. Eliz. was too late. *Kain v. McGill*, 151.

CUSTOM.

See PLEADING, 10.

CUSTOMS (COLLECTOR OF.)

Liability for defalcations of deputy.]—A. having been appointed collector of customs, gave a bond to her Majesty, conditioned that he should in all things well and truly discharge his duty as collector, and account for and pay over all the moneys which should come into his hands; and having received written instructions that all entries were to be made by him, all permits were to be granted and signed only by him, and payment of all duties to be made to him, except under certain circumstances. *Held per Cur.*, that having permitted the deputy collector rightfully to assume and perform duties entrusted to him alone, he was responsible under his bond for defalcations of the said deputy collector. *The Queen v. Stanton*, 18.

DAMAGES.

See ASSUMPSIT, 2.

DEBENTURES.

See MUNICIPAL COUNCIL ACTS 4.

DEED.

See MORTGAGE.

Priority of registry.—A. being the patentee of a lot of land, conveyed it in 1838 to B.: B. in 1840 conveyed it to C. without registering the deed from the patentee to himself, which was not registered until April 1843: C. not having registered his deed from B. until May, 1845, in September, 1847, conveyed to the defendant: in May, 1844, B. executed another conveyance of the property he had already conveyed to C. the lessors of the plaintiff, who registered their deed in February, 1845, thus gaining priority of registry over C., who did not register his deed until May, 1845. *Held*, that it was not necessary that the deed should be registered to pass the title from the patentee to B., and from B. to C., and that the defendant shewed either a *primâ facie* title in himself, or that no estate vested in the lessors of the plaintiff. *Doe dem. Shibley v. Maldron*, 189.

DE INJURIA.

See MARRIAGE (BREACH OF PROMISE).

DOWER.

See ADMISSIONS, 2.—PLEADING, 2, 3, 4, 5.

Exchange of lands.—1. A demandant of dower is not entitled to dower out of land of which her husband died seized, and likewise out of other land of which the husband was seized in his lifetime, and which he had given in exchange for the land of which he died seized. The widow is entitled to elect out of which property she will take her dower. Such election must be pleaded by a party defend-

ing in an action for dower. *White v. Laing*, 186.

Widow of naturalized alien.—2. The widow of an alien who has been naturalized is entitled to dower. *Id.*

DURESS.

See MONEY HAD AND RECEIVED, 3.

EJECTMENT.

See RECORD (NISI PRIUS), 1, 2.

ELECTIONS.

See MUNICIPAL COUNCIL ACTS, 1.

ESTOPPEL.

See AGREEMENT.—LANDLORD AND TENANT, 1.—MUNICIPAL COUNCIL ACTS, 4.

Sheriff's vendee.—The lessor of the plaintiff having previously recovered judgment against the defendants, in an action brought on the covenants for the payment of money contained in two several mortgages on which this action of ejectment was brought, in which prior action the defendant had pleaded usury and the issue thereon having been found for the plaintiff, an execution issued against the lands of the defendant and the premises contained in the mortgages were under the stat. 12 Vic. ch. 73, sold to the defendant, who at the time of the trial of this action was in possession, claiming to hold under a deed from the sheriff. *Held*, that there was a sufficient privity of estate between the purchaser at the sheriff's sale (the defendant in this suit), under the execution against the judgment debtor to enable the lessor of the plaintiff to estop the defendants from setting up the same defence of usury unsuccessfully set up by the judgment debtor,

under which the defendant claims.
Doe Mills v. Kelly 1.

EVIDENCE.

See ADMISSIONS—CASE (ACTION ON THE).—COMMISSION TO EXAMINE WITNESSES.—NEW TRIALS, 4, 5, 6.

Non assumpsit—Evidence thereunder.]—The defendant having been arrested at the suit of one Miller requested the plaintiff to join him as maker of a promissory note to the said Miller for the amount of the debt which he did, and the note not being paid at maturity, the plaintiff was obliged to pay the same, with costs, &c. The plaintiff then sued to recover the amount paid by him as surety for the defendant, and sets out in his declaration that, in consideration that the plaintiff would join the defendant in signing, as maker, a promissory note, jointly and severally promising to pay Charles Miller or order the sum of, &c., for defendant's use and benefit defendant promised the plaintiff to indemnify and save him harmless from the payment of the said sum of money, and any loss or damage which he should suffer by reason of his making the said note. The plaintiff then alleges that he did join with the defendant in making the said note, &c. The defendant pleads—1st, Non-assumpsit; 2nd, Set-off; and 3rd, That the plaintiff did not make the note for his accommodation, &c. Held, that the making of the note was not put in issue by the plea of non-assumpsit. *Blake v. Harvey*, 310.

FALSE RETURN.

See PLEADING, 1.

FIXTURES.

Trade fixtures.]—The saws and other machinery of a saw mill are not trade fixtures severable from the

mill, and entitled to be regarded as personal property. *Richardson v. Ranney*, 460.

GUARDIAN.

No power to avoid promise of marriage made to infant.]—See "Marriage (Breach of Promise)."

HUSBAND AND WIFE.

See DOWER.

INFANT.

See SEDUCTION.

Guardian cannot avoid promise of marriage made to.]—See "Marriage (Breach of Promise)."

INSURANCE.

See MONEY HAD AND RECEIVED, 2.—PLEADING, 6.

IRREGULARITY.

See RECORD (NISI PRIUS), 1, 2, 3.

JOINT CONTRACTORS.

See BILLS OF EXCHANGE ETC.—PLEADING, 11.

LANDLORD AND TENANT.

Sale by landlord out of possession—Adverse possession.]—A. being in possession of the west half of a certain lot of land as assignee of the vendee of the Crown (no patent having issued) assigned the same to B., one of the lessors of the plaintiff. but continued in possession of the southwest quarter of the said west half; and having accepted from B. a written permission to occupy the same, afterwards disavowed his holding by such permission, and claimed to hold the same in his own right. During the period A. claimed to hold in his own right B. assigned the whole west half to C., the other lessor of the plaintiff. Held, that the defendant A. having

created the relation of landlord and tenant, to the extent at least of a tenancy at will by accepting the written permission of B. to occupy a subsequent disavowal by him, could not create a holding so adverse to B. as to prevent B.'s assigning to C. without first obtaining possession by ejectment. *Doe Henderson v. McWade et al.*, 8.

Agreement for a lease—Covenants, &c.—Lease never executed.—2. The declaration set out that A. by an agreement under seal leased certain premises to B. and his assigns, and the declaration alleged, by said agreement it was agreed between the said A. and B. that B. was to pay the annual rent of 10*l.* and to get a lease of A. for twenty-one years, with a renewal or valuation at the termination thereof—said B. paying all expenses in case of a renewal. At the end of the second period B. to receive no allowance for any improvement; lease to be perfected with the usual covenants between landlord and tenant, at the request and expense of the said B. that at the expiration of the twenty-one years B. applied to A. to execute a further lease for a renewal term of twenty-one years at an annual rent of 10*l.* A. refused to execute the lease or grant to B. any renewal for a further term, contrary to the said covenant or memorandum of agreement. *Held*, on demurrer that the memorandum of agreement contains no covenant for the renewal of the term at the expiration of twenty-one years. *Leys v. Baldwin et al.*, 488.

LEASE.

See LANDLORD AND TENANT, 2.

LIMITATIONS (STATUTE OF.)

Reality—Discontinuance—Absence abroad.—In 1822 the defendant, being in possession of the whole, conveyed part of the lot of land to

the lessor of the plaintiff who resided out of and was not at the time of the execution of the conveyance in the province of Upper Canada. The lessor of the plaintiff made no entry on the land nor did the defendant by any specific act deliver or relinquish possession, but ceased to exercise any act of ownership over, and did not occupy the part conveyed. The lessor of the plaintiff was in the province of Upper Canada in 1823 and again in 1824 for a few days each time; after that period the defendant resumed possession of the land conveyed. *Held*, that possession in the lessor of the plaintiff followed the conveyance of the estate, and that such constructive possession will be presumed to continue until proof of actual entry by a stranger or of discontinuance by some distinct act evincing intention to do so: the absence from the province and the want of actual occupation for more than twenty years by the lessor of the plaintiff is not a discontinuance of possession within the 17th section of 4 Wm. IV. ch. 1; and that the lessor of the plaintiff was not barred by the Statute of Limitations. *Doe Cuthbertson v. McGillis*, 124.

MALICIOUS PROSECUTION.

Proof of malice and want of probable cause.—Where A. goes before a justice of the peace and charges B. with having clandestinely removed and secreted a quantity of wool and books belonging to him, and the justice of the peace on such complaint of A. issues his warrant directing his constable to search for the said books; and if the same should be found, to bring the books so found, and also the said B. before him, to be dealt with according to law: *Held*, that the charge and nature of the complaint not being such as authorized or justified the justice of the peace in issuing

his warrant, B. can only recover against A. by proving that in making the complaint A. acted maliciously and without any reasonable or probable cause. *McNellis v. Gartshore*, 464.

MARRIAGE (BREACH OF PROMISE.)

Promise cannot be avoided by infant's guardian—De injuriâ.]—To a count in assumpsit for a breach of promise of marriage, the defendant pleaded that after the contract and promise, &c., and before breach, to wit, on, &c., it was agreed by and between defendant and one D. W., who then was the legal guardian of plaintiff, who was then an infant, and by and with the concurrence and approbation of plaintiff, that the said contract and promise should be, and the same was thereupon rescinded by the defendant and plaintiff's guardian, with the plaintiff's consent and concurrence. *Held*, that the plea was bad; on the ground that the contract could only be avoided by the act of the infant, and not by the act of the guardian. *Held* also, that the replication of *de injuriâ* to the above plea is bad, on the ground that it is only good when the plea admits the breach of the promise stated, and excuses it. *Parks v. Maybee*, 257.

MONEY HAD AND RECEIVED.

Transfer of debts.]—1. A. being indebted to B. conveys to him lands in trust to sell, and after paying his own debt to pay over any surplus remaining to A. Whilst this trust remained open C., being also a creditor of A. for the amount of two promissory notes made by A, payable to him (C.), indorses these notes to B. with the assent of A., upon the agreement that B. should pay to C. the amount of the notes out of

any surplus of the proceeds of the lands which should remain in his hands after paying his own debt. *Held*, that it not being proved that the account between A. and B. was ever finally adjusted, money had and received would never lie by C. against A. to recover the amount of the promissory notes. When money is received in the execution of a trust, an action for money had and received cannot be maintained against the trustee, so long as such trust remains open. *Quære*, whether in this case, even if there had been a final settlement between A. and B., leaving a surplus in B.'s hands, C. could have recovered against B. without declaring specially. *McPherson v. Proudfoot*, 57.

Insurance Money.]—2. B. having insured a mill erected on a portion of the lands conveyed in trust as above, and having received the insurance money therefor, *Quære*, whether he was accountable to A. therefor. *Semle*, he was not. *Ib.*

Tolls exacted by compulsion.]—3. *Semle*, that money paid as tolls under compulsion, in order to enjoy a road, may be recovered in an action for money had and received. *Little v. The Dundas and Waterloo Macadamized Road Co.*, 399.

MORTGAGE.

A registrar is bound to register or file a certificate or discharge of a portion of the lands contained in a mortgage. *In re Ridout, Registrar, &c.*, 477.

MUNICIPAL COUNCIL ACTS.

Setting aside election.]—1. The court will not set aside an election on the relation of a party who concurred in the election, and voted for the person whose election he afterwards attempts to set aside. *The Queen ex rel. Rosebank v. Parker*, 1.

By-law for payment of a debt or creating a loan.—2. Municipal councils under the 12 Vic. ch. 81, in any by-law passed for payment of a debt or creating a loan, must settle and direct to be levied a special rate for such purpose. *Mellish v. The Town Council of the Town of Brantford*, 35.

Municipal year.—3. The municipal year under 12 Vic. ch. 81, begins on the 1st of January and ends on the 31st of December, and not from the day appointed for the municipal elections of one year to the same day of the next year. *Ib.*

Debentures under, invalid by-laws no estoppel.—4. A debenture issued by a municipal council under their corporate seal, and signed by the head of such corporation for payment of a debt due, or loan contracted under a by-law which does not provide by special rate for the payment of such debt or loan, does not estop such municipal council from setting up as a defence to an action on the debenture the invalidity and nullity of such by-law. *Ib.*

177th section of 12 Vic. ch. 81.—5. The 177th section of the act 12 Vic. ch. 81 relates to *all debts and interests* lawfully incurred and becoming payable within the year. *Ib.*

By-laws.—6. A by-law of a municipal council is valid if it appears on the face of it to be enacted and passed by a municipal body having authority to make such by-law under the statute 12 Vic. ch. 81. *In re Hawkins v. The Municipal Council of Huron, Perth, and Bruce*, 72.

Variance in name.—7. A variance in stating the legal name of such municipal corporation in a by-law will not invalidate such by-law, if it appears on the face of it to be enacted and passed by a corporation having authority to pass it. *Ib.*

Supplementary by-laws.—8. Municipal corporations under 12 Vic. ch. 81, may by subsequent by-law impose an additional rate to provide for any deficiency in the sum levied under a previous by-law for payment of debts incurred previous to the 1st of January 1849. *Ib.*

Non-resident, if freeholder, may move to quash by-laws.—9. Where in an application to quash a by-law passed by the municipality of a township, it was objected that the applicant was a non-resident: *Held per Curiam*, that as a freeholder of the township the applicant had an interest in all by-laws passed by the township council sufficient to enable him to move to quash any of them. *De La Haye v. The Municipality of the Township of, and the Gore of Toronto*, 317.

By-law assessing residents only for school rates—Costs.—10. Where the municipality of a township, intending to act under the statute 13 & 14 Vic. ch. 48, for common school purposes, declared a rate upon the resident inhabitants of a school only—*Held per Cur.*, that under 13 & 14 Vic. ch. 48, as well as the U. C. Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the *taxable property* within the section, whether of residents or non-residents. *Held also*, that in such case the court has no discretion, but must quash the by-law with costs. *Quære*: Whether in the present case the rate and assessment to be levied were stated in the by-law with sufficient certainty. *Ib.*

Indemnity to councillor.—11. A by law passed to indemnify a township councillor elect for the costs of a *quo warranto*, by which his election was set aside, is illegal. *In re Bell v. The Municipality of the Township of Manvers*, 507.

NAVIGATION.

See ST. LAWRENCE TUG BOATS.

Collision between steamers.—In cases of collision between vessels, a defendant is not liable unless the whole fault can be attributed to his vessel. *Held* in this case, that it does not satisfactorily appear that all or any of the blame can be justly attributed to defendants' vessel. A verdict therefore found for the plaintiffs at Nisi Prius was set aside and a new trial granted. *Bowen et al v. Ewart et al.* 542.

NEGLIGENCE.

See CASE (ACTION ON THE).

NEW TRIALS.

Granted on grounds of surprise.]
—1. See "Admissions."

Excessive verdicts.—2. See "Verdicts."

Seduction—New trial on the evidence.—3. See "Seduction."

Misdirection.]—4. Where the charge of the learned judge who tries a cause is calculated to make an impression on the jury prejudicial to a party, which the evidence and circumstances do not entirely warrant, the court will grant a new trial without costs, on the ground for misdirection. *White v. Crawford*, 352.

Verdict for defendant—Evidence—Plaintiff entitled to admitted issues.]
—5. Defendant being the agent of plaintiffs, and having received large sums of money, as such agent, on account of plaintiffs, and having deposited the same, mixed with his own and other persons' moneys, in a safe in his office, which was broken into and the money stolen, a verdict having been rendered for defendant at *nisi prius*: *Held*, that there should be a new trial, with costs to abide the event, on the

ground that it did not appear with sufficient certainty, on the evidence that there was a sufficient amount in the safe at the time of the robbery to satisfy plaintiffs' claim: and also, on the ground that the plaintiffs were entitled to nominal damages, at all events, on the counts for money lent, money paid, &c., to which there was no answer on the record.—*Gore Bank v. Hodge*, 359,

Contradictory evidence.—6. Defendant having agreed to deliver plaintiff a quantity of pork which would pass inspection in Montreal as of a certain quality—which it did not—and an action having been brought, and the evidence at the trial as to the quality of the pork being contradictory, the court refused to disturb the verdict for the plaintiff, on the ground for the jury to decide between the evidence of the plaintiff and that of the defendant. *Stevenson v. Rae*, 406.

NISI PRIUS RECORD.

See RECORD (NISI PRIUS.)

NOMINEE OF THE CROWN.

See LANDLORD AND TENANT, 1.

NON ASSUMPSIT.

Admissibility of evidence thereunder.—See "Evidence."

NOTICE OF ASSESSMENT.

See NOTICE OF TRIAL, 1.

NOTICE OF TRIAL.

See RECORD (NISI PRIUS), 3.

Agreement to accept short notice—Notices of assessment served.—1. Where an attorney has obtained extensions from time to time to plead, agreeing to take short notice of trial, or any notice, or to go down to trial without notice, and short

notice of assessment was served—*Held*, that the court would not set aside the verdict, on the ground that the attorney had agreed to accept the short notice of trial, &c., but no notice of assessment. *Williams v. Lee, Williams v. Vansittart*, 157.

Short notice—Time.]—2. *Held*, that under the practice here, short notice of trial means four days' notice, the first and the last days inclusive. *Ib.*

PLACITA.

See RECORD (NISI PRIUS), 1. 2.

PLEADING.

See ADMISSIONS, 2—COMPOSITION—MARRIAGE (BREACH OF PROMISE).

Action for false return—Argumentativeness.]—1. To an action by an execution creditor for not levying and falsely returning *nulla bona* to a writ of *fi. fa.* the defendant pleaded, that at the time of the delivery of the writ there were goods, &c., of the execution debtor whereout he might have levied &c.; and that afterwards, and before the return, and before a reasonable time had elapsed for seizing the said goods, &c., under the writ, and before any default or breach of duty by defendant, as sheriff in respect of the said writs, and before suit, to wit, &c., the plaintiffs ordered the defendants not to take any proceedings on the writ until further directed. The plea went on to shew, that afterwards, and before the return, &c., to wit, &c., the plaintiffs further directed the defendant the defendant to proceed and execute the writ; and that at the time of the last mentioned direction, and thence continually, there were not any goods, &c. Verification. Upon special demurrer, assigning for cause that the plea was an argumentative and indirect traverse that there were any goods of the execution debtor whereout the defendant

might have levied, and that the omission to levy between the delivery of the writ and the further direction to the defendant was not sufficiently excused by the averment in the plea that the execution of the writ was countermanded before a reasonable time had elapsed for seizing the goods under it: *Held*, that the plea was a good defence to the action and was well pleaded. *Davis et al v. Jarvis, Sheriff*, 161.

Dower—Replication to plea of ne unques accouple.]—2. Replication to a plea of ne unques accouple: that the demandant, on the 1st of May, 1790, and before suit, was accoupled to A. B. deceased, in lawful matrimony, concluding to the country. Demurrer: that the replication does not state or allege when, where, or in what kingdom, &c., demandant was accoupled to the said A. B. in lawful matrimony as therein alleged, or by what minister, &c., or according to what religious rite, or by what law, &c., nor is it therein alleged that the said marriage was contracted before or during seizin of the said A. B. *Held*, that the replication was good without alleging when, or by whom, or by what form of religious rite the demandant was married. *Williams v. Lee, and Williams v. Vansittart*, 175.

Plea, ne unques seizie—Replication.]—3. Plea: That the said A. B. was not, &c., seized of the said lot, &c., or of any part thereof, of such an estate whereby he could endow defendant thereof: verification, &c. *Replication*: That the said A. B. &c., was seized of such an estate in the said lot, &c., whereby he could endow demandant thereof: to the country. *Demurrer*: That the replication is uncertain and insufficient in alleging that he had such an estate, &c. without shewing what estate he had or was seized or possessed of in the said land, or whether it was such an

estate as entitled her to dower at common law, or under the statute 4 Wm. IV. ch. 1, &c., : *Held*, That the plea should have concluded to the country, and that the objections applies equally to the plea, which does not deny any such interest in the husband as under the statute would have entitled the demandant to dower, and that the replication meets the plea and alleges the seizin, which is therein denied. *Ib*.

Replication to plea of alienage.]—4. Replication to 3rd plea: That the said A.B. was at the said several times when &c., in the third plea mentioned a good and lawful subject of the United Kingdom of Great Britain and Ireland, &c., and was not an alien or subject of the United States of America, as in said plea alleged: to the country. *Demurrer*: That the replication is double and uncertain, in taking issue on several distinct material and facts—namely in denying the allegation that the said A.B. was not a subject of the United Kingdom, &c. and also denying that he was not a subject of the United States, and also that he was at any time an alien: that it should have shewn either that the said A. B. was a natural-born subject or a naturalized subject, or how otherwise: *Held*, That the replication, taking issue on both the branches of the plea, is good. *Ib*.

Replication to plea denying right within twenty years.]—5. Replication to the 4th plea: That she did become entitled to demand her dower, &c., within twenty years next before the commencement of suit, modo et forma. *Demurrer* to replication: That it is not shown or stated affirmatively when or in what day the said demandant became entitled to demand her dower in the said land, &c. *Held*, that the replication alleges time, namely, within twenty years—though not the day, but that the day need not necessarily be stated. *Ib*.

Action of Policy of Insurance—Joint contract—Declaration.]—6. A declaration on a Policy of Insurance setting out a statement of facts from whence it may be inferred that the insurance was effected for the joint benefit of the plaintiff and another, held bad, for not distinctly averring the interest of the other, and that the action was brought on the joint account of the plaintiff and the other shown by the statements set out in the declaration to be interested in the goods insured. *Dunlop v. Aetna Insurance Co.*, 252.

Joinder of counts.]—7. First count states that plaintiff, at the request of the defendant, had agreed to buy two certain parcels of walnut lumber then being in defendant's yard, in all 5000 feet, at 6l. 5s. per 1000 feet, to be paid for before delivery: then avers payment and delivery by defendant to plaintiff of a much less quantity, to wit, 3500 feet less than the contents of the said two parcels, as defendant well knew, and that defendant fraudulently and falsely deceived and defrauded the plaintiff, whereby, &c. Second count states that plaintiff, at request of defendant, had bargained for two other certain parcels of walnut lumber then being in defendant's yard, containing 5000 feet of a certain quality, to wit, good merchantable lumber, at 6l. 5s. per thousand feet, to be paid for before delivery; then avers payment and delivery by defendant of 5000 feet and as for the lumber so bargained for, yet that the lumber so delivered by the defendant as last aforesaid, was inferior in quality to the lumber so agreed to be bought, and was inferior in quality to the lumber so bargained for by a large sum of money, to wit, the sum of 5l. per 1000 feet, all of which the defendant knew, and that defendant deceived and defrauded plaintiff whereby, &c. *Held per Cur.*, that there is no misjoinder of counts. *Keise v. Miller*, 296.

Breach of contract—Special assump-

sit—Assignment of breaches.]—8. In special assumpsit for not accepting schooner, the declaration set out that in consideration that the plaintiff would sell to the defendant the schooner in question, “*together with all and singular the apparel, tackle and furniture, boats, oars, and appurtenances to the said schooner belonging or appertaining*, and convey and assure the same to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all incumbrances,” for a stated price, the defendant promised, &c. The declaration then alleged a delivery of the schooner to the defendant under the contract, “*together with the apparel, tackle, furniture and appurtenances thereunto belonging, and the said boats and oars*,” and averred that at the proper times “*the said schooner or vessel was free from all incumbrances*” and that the plaintiff was, at all such times, “ready and willing to make and execute a conveyance or bill of sale of the said schooner or vessel with the said appurtenances, boats, and oars, and to do every thing on his part to be done or performed by the said contract,” and did, to wit, &c., tender to the defendant a conveyance or bill of sale of the said vessel, with the said appurtenances, boats, and oars, in manner and according to the terms aforesaid.” Breach—that the defendant refused, &c. Upon special demurrer, it was *held* that the declaration was bad for not alleging that the conveyance tendered embraced the “*apparel tackle and furniture*,” and because it was not inconsistent with all the averments that the “*apparel, tackle, and furniture*,” might not be free from incumbrances. *Phillips v. Merritt* 299.

U. C. College—Change of name—Averments “quod cum.”]—9. The plaintiffs, by the name of the Upper Canada College and Royal Grammar School declared on a bond made between the chancellor, president, and scholars of King’s College and the

defendant, and in their declaration aver as follows; “And whereas the said indenture and covenant (although made with the chancellor &c. as aforesaid) was so made for and on behalf, and for the benefit of the plaintiffs; and whereas by an act of parliament of this province, passed in the 12th year of her Majesty’s reign, &c., intituled, &c., the plaintiffs are entitled to the benefit of the said indenture and covenants, as if the plaintiffs had been named therein as the parties of the second part.

Demurrer—Special causes assigned, 1st. That it does not appear by the said declaration, or by the said indenture or covenant as therein set forth, that the said indenture or covenant was made to the parties of the second part on behalf, or to, or for, or for the use and benefit of the said college, except by the averment in the declaration to that effect, which averment is repugnant to the covenant itself as set forth, and can only be supported by parol evidence, which must necessarily alter and vary the effect of the said covenant. 2nd. Also, that if such averment is admissible, the plaintiffs have not made a direct and positive averment of the necessary fact, but have merely recited such fact contrary to the rules of good pleading. *Held*, that the effect of the statutes 12 Vic. ch. 82, and 13 & 14 Vic. ch. 49, was to transfer the covenant from the University of King’s College to the plaintiffs; and consequently gives them the right of property in the indenture declared on, and entitles them to recover thereon in the name used: that proof that the covenant was made on the behalf and for the benefit of the plaintiffs would not be contradicting the deed or covenant: that an averment of a material fact in a pleading by way of “*quod cum*” is sufficient. *The Principal of U. C. College and Royal Grammar School v. Boulton*, 326.

Plea setting up custom—Averment of notice.—10. *Plea*—That according to the custom and usage of forwarders and carriers existing at Toronto, consignees are authorized to pay wharfingers the amount due from them to such forwarders and carriers, for the forwarding and carrying of their goods. *Held per Cur.*—That assuming the alleged custom to be valid, notice thereof, to the plaintiff, if not acquiescence therein, should be alleged. *Torrance et al. v. Hayes et al.*, 338.

Promissory note—Materiality—Negative pregnant.—11. Declaration on a promissory note alleged to have been made by the defendants under the name of A. B. & Co. promising to pay C. & D. who indorsed to plaintiffs. *Plea* by A. B.—that he did not make the note in the declaration mentioned. *Demurrer*—The causes specially assigned are that the plea offers an immaterial issue; and that as in the declaration the defendants are charged as joint makers, it is no answer for one of them to say that he did not make the note, and that the plea traverses a negative pregnant: *Held*, that the plea traversing the making of the note is clearly material, and it does not contain a negative pregnant. *City Bank v. Kellar et al.*, 508.

PRACTICE.

See COSTS.—NOTICE OF TRIAL.—RECORD (NISI PRIUS), 1, 2.—VERDICTS.

PRINCIPAL AND AGENT.

See NEW TRIALS, 5.

Liability of collector of customs for defalcations of deputy.—1. *See* "Customs (collector of)."

Wharfinger not agent of forwarder.—2. *Semble*, that a wharfinger is not an agent of the forwarder, to

whom the consignee is authorized to make payment, after the delivery of the goods to the consignee, and after an account has been stated between him and the forwarder. *Hayes et al. v. Torrance et al.*, 338.

PROMISSORY NOTES.

See PLEADING, 11.

RECORD (NISI PRIUS).

Ejectment—Omission of placita—Irregularity.—1. A nisi prius record in ejectment having been passed and brought to trial without a second *placita*, *held*, that the omission was not a sufficient ground for setting aside the trial or verdict for irregularity. *Doe Mills v. Kelley*, 1.

2. The jury having been sworn to try an action of ejectment, after the plaintiff had given evidence of his title it was objected that the record was made up without continuances or second *placita*, and the defendant refused to confess entry, lease, and ouster, and the plaintiff was nonsuited. A rule nisi having been granted to set aside the nonsuit, *Held*, that the rule should have been to set aside the verdict. *Held also*, that the objection to the nisi prius record was made too late. *Held also*, that the nisi prius record might have been amended. *Doe Sherard v. Lowry*, 165.

Ejectment—Leave to amend by adding demises, abandoned.—3. A judge's order having been obtained to amend the proceedings in an ejectment suit, after the consent rule and plea had been filed, (by adding three new demises,) and no proceedings having been taken under the order until the commission day of the assizes—being some months after the granting of the order—when the nisi prius record was passed with additional demises. The record was entered for trial, and the defendants made no objection to

case proceeding until after the jury had been sworn and the plaintiffs had given evidence, when the defendants objected to the amendment and refused to confess lease, entry, and ouster, except to the original demises, and a verdict was entered for the plaintiffs on the original demises only. *Held*, on an application to set aside the verdict on the original demises, that the new demises added to the *nisi prius* record did not violate the *nisi prius* record or verdict; and that the lessor of the plaintiff could abandon the order to amend, *Held also*, that, after the defendants appearing and confessing the lease, &c., it was too late to object to the regularity of the notice of trial. *Doe dem. Duff et al. v. Dougall et al.*, 169.

REGISTRY AND REGISTRAR.

See DEED.—MORTGAGE.

ROADS.

See MONEY HAD AND RECEIVED, 3.

Tolls.]—A road company is, under the statute of 14 & 15 Vic. ch. 122, sec. 3, authorized to take tolls at each gate at each time of passing, for any portion of the road, on either side, or on both sides of a gate, for a distance of not more than half way, and not exceeding five miles of the whole. *Little v. The Dundas & Waterloo Macadamized Road Company*, 399.

SEDUCTION.

New trial on the evidence.]—In an action for seduction, where the person seduced in giving her evidence declared that another person whom she formerly charged with being the father of the child had been so charged falsely by her, that the defendant was the father of the child, and her evidence having been contradicted and shaken in many particulars, the amount of

the verdict being considerable, the court granted a new trial on payment of costs. *Cane v. Reid*, 342.

SHERIFF.

See PLEADING, 1.

SHERIFF'S VENDEE.

See ESTOPPEL.

SLANDER.

Whether the words are actionable or not as understood by strangers.—

The declaration sets out that the plaintiff carried on the business and trade of a weaver in, &c., and was, &c., and that before speaking the words mentioned in the declaration, defendant had retained and employed plaintiff to weave thirty-five pounds of yarn for him, and that the defendant had delivered such yarn to the plaintiff for that purpose: that upon the said yarn being wove, &c., it had been alleged by defendant that five pounds of the yarn was deficient, and had been feloniously stolen by the plaintiff. The declaration then, in the third count, alleged that the defendant in a certain other discourse of and concerning the yarn, and in the presence and hearing of divers persons, spoke and published the following words, that is to say: "Thomas Young (the plaintiff) stole five pounds of my yarn; it was a roguesh trick." And in the fourth count the words are alleged to have been, "Thomas Young stole five pounds of my yarn." *Held*, that the words spoken in the presence of strangers, ignorant of the particular circumstances relating to the yarn were actionable. *Held*, on motion in arrest of judgment on the ground that plaintiff being bailee could not be guilty of larceny, that the use of words imputing an indictable offence is actionable or not according to the sense in which they may be fairly understood by by.

standers not acquainted with the matter to which they relate. *Young v. Sloan*, 284.

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF.)

STATUTES (CONSTRUCTION OF.)

43 Eliz. ch. sec. 9—See Costs.

22 & 23 Car. II. ch. 9—See Costs.

4 Wm. IV. ch. 1, sec. 17.—See Limitations (Statute of.)

9 Vic. ch. 34, sec. 23—See Mortgage.

12 Vic. ch. 81—See Municipal Council Acts.

12 Vic. ch. 82—See Pleading, 9.

13 & 14 Vic. ch. 48—See Municipal Council Acts, 10

13 & 14 Vic. ch. 49—See Pleading, 9.

14 & 15 Vic. ch. 7, sec. 8—See Mortgage.

14 & 15 Vic. ch. 66, sec. 2—See Admissions, 1.

14 & 15 Vic. ch. 122, sec. 3—See Roads.

ST. LAWRENCE TUG BOATS.

Delays—Liability of owners therefor.—Declaration: That defendants were owners of a line of tow-boats on the river St. Lawrence and St. Lawrence canals, and that they received a schooner of plaintiff's to be towed from Lachine to Kingston for reasonable reward, &c., and undertook to use due and reasonable diligence and dispatch in towing said schooner. Breach—want of diligence and unreasonable delay, &c. *Pleas*—1. Non-assumpserunt. 2. That they did use due diligence and dispatch, &c. *Facts*—Defendants had entered into a contract with government to tow vessels on the river St. Lawrence. A public notice signed by the secretary of the Board of Works, and containing regulations for towage, &c., also signed by defendants, appeared in a public newspaper at Kingston. One of the defendants, when examined as a witness, proved the contract with the government. Plaintiff's schooner was taken in tow

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at Lachine by one of the line, and, through the tow-boat, was several times, delayed and detained before reaching the place of destination. *Held*, that the contract with the government was sufficiently proved: that the line of the tow-boats having been established according to the printed notice import the basis on which future constructive or implied agreements with individual ship owners are to be rested: that the plaintiff's vessel with a fixed and known destination having been taken in tow by a tug of defendants, the inference must be that she was to be towed through to her place of destination with due and reasonable diligence according to the provisions contained in the public notice, and that without a special agreement on the subject she should not be dropped or deserted at the pleasure of the owner of the tug. *Gaskin v. Calvin & Cook*, 527.

TOLLS.

See MONEY HAD AND RECEIVED, 3.—ROADS.

TRESPASS.

See Costs.

TRUST AND TRUSTEE.

See MONEY HAD AND RECEIVED, 1.

UPPER CANADA COLLEGE.

See PLEADING, 9.

VARIANCES.

In name of a corporation as stated in a by-law.—“Municipal Council Acts, 7.”

VENDOR AND PURCHASER.

See AGREEMENT.

Under what circumstances the property in chattels vests in a vendee by the contract of sale.—In an action of trover for wheat and flour of the plain-

tiff, it appeared that H. K. & Son, being the owners of a grist mill, on the 14th October 1851, applied to the plaintiff's agent for an advance upon 5000 bushels of wheat alleged by them to be in the mill, for which they produced the warehouse receipt. The agent preferred purchasing the wheat for the plaintiff, and they therefore gave him the following receipt: "500*l*. Received from R. A. G. agent, for Thomas Rigney, New York, 500*l*. on account 5000 bushels of wheat sold him at 2*s*. 9*d*. per bushel. Toronto, 14th of October 1851. (signed) H. K. & Son." And he thereupon paid the 500*l*., minus his charge for agency and brokerage. The wheat in the mill was on the same day insured by H. K. & Son at the request of the plaintiff's agent, in their own names, the policy provided that in case of loss the amount should be paid to the plaintiff. The agent then agreed with H. K. & Son for grinding 5000 bushels of wheat at their mill before 1st January following, and he debited them with the 500*l*. paid on account. On the 16th of October the plaintiff's agent went to the mill and took a sample of the wheat, but as it appeared, without the knowledge of H. K. & Son or their servants. No delivery of any part was at this time or previously made. On the 18th, the agent, without any further communication with the parties, made out bought and sold notes, and transmitted the bought note by letter to the plaintiff, and delivered the sold note to one of the firm of H. K. & Son, directing them at the same time to deliver the flour as ground, marked [R] to a wharfinger in Toronto for shipment to the plaintiff at New York. On the 31st October H. K. & Son assigned all their property to the defendants, who duly registered the assignment, and on the 4th November H. K. & Son delivered possession to the defendant's clerk, which possession was

continued thenceforward by the defendants. On the 5th November the plaintiff's agent took a formal delivery at the mill of all the wheat and flour there, being 348 barrels of flour and 1500 bushels of wheat, (the defendant's clerk being on the premises but not interfering), and again directed that it should be sent to Toronto. None of the flour at that time had been marked [R], but 300 barrels were so marked on this occasion. The flour was not sent, as the defendant's agent forbade the teamsters to take it, and on the 7th November he obtained possession for the defendants of all the wheat and flour in the mill, which was afterwards shipped on defendant's account, some of it being marked [R] and being 670 barrels in all. At the trial the evidence was given by the miller of H. K. & Son as to the quantity of wheat in the mill on the 18th October, and of the flour delivered from the mill before the assignment to the defendants, upon which the defendants contended that from the proven course of business in the mill, none of the indential wheat in the mill at the time of the sale to the plaintiff could have been manufactured into the flour of which the defendants had taken possession under the assignment. The jury found a verdict for the plaintiff, with 344*l*. 3*s*. 4*d*. damages. The court made absolute a rule for a new trial upon payment of costs, holding that the evidence left it doubtful whether the property in any wheat ever vested in plaintiff; and 2ndly, that the weight of evidence rendered it probable that no part of the wheat in the mill at the time of the contract with the plaintiff came into the defendants' possession. *Rigney v. Mitchell et al.*, 266.

VERDICTS.

See NEW TRIALS.—RECORD (NISI PRIUS), 2. 3.

Practice of Court, when excessive.]

—Where a jury gives a greater verdict than is warranted by the evidence and data by which they ought to have been guided, the court will, where the amount is mere matter of computation direct a verdict for the plaintiff for the correct amount, or grant a new trial on payment of costs. *Stephenson v. Ranny*, 196.

WAIVER.

See RECORD (NISI PRIUS), 2, 3.



WHARFINGER.

See PLEADING, 10—PRINCIPAL AND AGENT, 2.

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